

# Legal Consequences For Foreign Guarantees in Indonesia Who Do Violation

*by lidya uinsa*

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**Submission date:** 11-Dec-2023 10:22PM (UTC+0700)

**Submission ID:** 2255644530

**File name:** 10.pdf (291.48K)

**Word count:** 5380

**Character count:** 29962



## Legal Consequences For Foreign Guarantees in Indonesia Who Do Violation

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**Abstract:** Every foreigner who holds a Visit Stay Permit, Limited Stay Permit, and Permanent Stay Permit is required to have a Guarantor who guarantees the existence and activities of guaranteed foreigners while in Indonesian Territory. The absence of detailed regulations and special legal protection for a guarantor has various impacts and consequences. One of them is the lack of responsibility of a guarantor. This research is legal research, which focuses on legal studies on positive law. The problem approach used is the philosophical approach, the statutory approach and the conceptual approach. primary legal materials in the form of laws and regulations relating to research problems and secondary legal materials, namely legal materials that provide explanations of primary legal materials, such as legal books, journals, published magazines relating to the problem. The results of the research show that the responsibility of a guarantor is to supervise and monitor the activities of the foreigners he guarantees in Indonesian territory, to be responsible for the presence and activities of foreigners while in Indonesian territory, Article 63 paragraph (2) of Law no. 6 of 2011, which confirms the guarantor's obligation to report if there is a change in civil status, immigration status and change of address or becomes the subject of immigration administrative action in the form of deportation, the guarantor's sanctions for violations are more administrative in nature. More severe criminal sanctions are often not carried out in law enforcement. Supposedly a foreigner who violates the provisions of Article 116, the guarantor can already be said to have violated the provisions of article 118 because he does not fulfill obligations related to the existence of the guaranteed foreigner.

**Keywords:** Administrative Sanctions; Foreigners; Responsibility

### 1. Introduction

Supervision of foreigners in Indonesia is a series of activities aimed at overseeing the traffic of foreigners entering and leaving foreigners to and from the territory of Indonesia and the presence and activities of foreigners in the territory of the Republic of Indonesia. Supervision of foreigners as a series of activities has basically been carried out by representatives of the Republic of Indonesia abroad when receiving applications for visa applications. Monitoring is then carried out by immigration officials at TPI when immigration officials with autonomous authority decide to refuse or grant entry permits,

then are given residence permits according to the visa they have, then supervision shifts to the immigration office whose working area covers the foreigner's residence.

Law Number 6 of 2011 concerning Immigration regulates two things, namely regulating the traffic of people leaving, entering and staying from and into the territory of the Republic of Indonesia and regulating matters regarding the supervision of foreigners in the territory of the Republic of Indonesia. The Immigration Law also differentiates community service functions, law enforcement functions and security functions (Imigrasi 2020). The public service function is the function of administering government or state administration in the field of community service. Immigration is required to provide maximum services in the field of immigration for both Indonesian citizens and foreigners. Services for Indonesian citizens consist of issuing passports/providing Travel Documents like Passport/Cross-border Passes, issuing departure/entry signs. Whereas services for foreigners consist of granting and extending the validity period of immigration documents including KITAS/KITAP, extension of stay permits including Tourist Visit Visa, Socio-Cultural Visit Visa, Business Visit Visa, granting re-entry permits and departure permits, giving departure signs and enter.

Regarding the law enforcement function or security function, Immigration functions as the gatekeeper of the country because Immigration is the first and last institution that screens the arrival and departure of foreigners to and from the territory of the Republic of Indonesia. Work visas are a model of implementing immigration policies with the Prosperity approach, which uses a market-based mechanism to allocate work permits that allow employers to sponsor immigration visas. Work visas are expressly designed, to meet the labor demands of employers (Peri 2012). The selective policy approach provides a middle ground that balances between the prosperity approach and the security approach so that no one approach is without considering other approaches. Likewise with work permits for TKA. Although the needs related to TKA are determined through market mechanisms and the needs of employers and other prerequisite arrangements. Employers, both individuals and legal entities, must also be able to provide guarantees that supervision of foreigners is the responsibility of the guarantor.

Every foreigner holding a Visit Stay Permit, Limited Stay Permit, and Permanent Stay Permit is required to have a Guarantor who guarantees the existence and activities of guaranteed foreigners while in Indonesian Territory and is obliged to report any changes in civil status, Immigration status and change of address. However, the obligation of foreigners who must have a guarantor is exempted for foreigners holding ITK who come from free visiting visas, visit visas on arrival, or visit visas for tourism purposes, foreigners in the context of investment, pre-investment or second home with Immigration guarantee as regulated in Article 2 Paragraph (3) Permenkumham Number 36 of 2021 Concerning Immigration Guarantees. According to Article 3 paragraph (1) of the Minister of Law and Human Rights Number 36 of 2021 Guarantor consists of individuals and corporations. The guarantor must meet the following requirements:

- a. at least 21 (twenty one) years old or already married;
- b. residing in the territory of Indonesia for at least the last 6 (six) months;
- c. not currently in the process of criminal justice;
- d. not included in the immigration prevention list; And
- e. fixed income and/or have sufficient active funds to guarantee Foreigners

Law Number. 6 of 2011 concerning Immigration, binds a guarantor if he is proven to have committed negligence or a criminal act, related to his role as a person in charge of a foreigner, Article 118 confirms:

Any guarantor who intentionally provides incorrect information or does not fulfill the guarantee he has given as referred to in Article 63 paragraph (2) and paragraph (3) shall be subject to imprisonment for a maximum of 5 (five) years and a fine of up to Rp. 500,000,000.00 (five hundred million).

What's more, if a guarantor makes a mistake or negligence, there are no more binding rules. The Immigration Law also does not regulate in detail how an Indonesian citizen should be categorized as a guarantor for a foreign citizen. This then raises various possibilities of weak supervision of foreigners from the point of view of the function of a guarantor. Based on the background described above, the problem in this research is what are the responsibilities of foreign guarantors in Indonesia and what are the sanctions for foreign guarantors in Indonesia who commit violations?

## 2. Method

This research is legal research, which focuses on legal studies on positive law. The problem approach used is the philosophical approach, the statutory approach and the conceptual approach. The legal materials used in this study are primary legal materials in the form of laws and regulations relating to research problems and secondary legal materials, namely legal materials that provide explanations of primary legal materials, such as legal books, journals, published magazines relating to the problem.

Analysis of legal materials is carried out by first identifying the collected legal materials, then describing them, systematizing them based on legal scientific theories and legal concepts, principles, or principles of law. The analysis uses descriptive analysis, which is based on legal reasoning, legal interpretation, and legal argumentation in a coherent manner. Furthermore, conclusions are drawn using the deductive method of thinking, namely concluding the results of research from things that are general to specific things.

### 3. Discussion

#### 3.1. Obligations of Foreign Guarantor in Indonesia

Most countries have Ordinances that define who can enter their country, for how long, and the terms of their stay. As a foreigner, the right to enter a country is based on the assumption that staying in that country will be temporary and for a specific purpose. (Hassouri 2017)

There are two major regulatory regimes that regulate the use of foreign workers in Indonesia, the first is Law Number 13 of 2003 concerning Manpower as amended by Law Number 11 of 2020 concerning Job Creation from Articles 42 to 49 which regulates how the use of foreign workers in Indonesia. The second is Law Number 25 of 2007 concerning Investment as amended by Law Number 11 of 2020 concerning Job Creation. (Abduh 2020)

In terms of immigration arrangements, as the subject of immigration control, TKA are also regulated in several regulations related to immigration, including Regulation of the Minister of Manpower Number PER.02/MEN/III/2008 Concerning Procedures for Using Foreign Workers, it is explained that in terms of licensing TKA namely the Permit to Use Foreign Workers (IMTA), the Directorate General of Immigration is involved in the permitting process for work visas from the TKA concerned. After arriving in Indonesia, if there is a change in status, the TKA employer must submit an application for a recommendation for a temporary residence permit or permanent residence permit as the basis for IMTA.

The complexity of permitting the use of foreign workers and the number of foreign workers, causes many cases related to foreign workers, to be considered high every year. In 2015 there were 2,427 cases involving violations by foreigners (Frezy 2018). In 2018 and 2019 the dominant immigration violations that occurred came from foreigners. This is because in addition to labor regulations, immigration regulations are also an important consideration in the regulation of foreign workers in Indonesia, especially in terms of law enforcement, where the high number of foreigners entering Indonesia certainly creates opportunities for violations by foreigners, especially regarding the purpose of entry and violation of activities carried out by the foreigner.

Law Number 6 of 2011 confirms:

The function and role of migration in Indonesia is to regulate the flow of people in and out of the territory of the Republic of Indonesia and regulate the passage of these people related to national development and relations between nations.

The function and role of immigration in the context of world developments at that time and now has national and international aspects. The immigration function has a national aspect because immigration laws and regulations function to regulate the movement of people and protect national interests. On the other hand, the immigration function also

has an international aspect because immigration laws and regulations regulate the traffic of foreigners using an international cooperation approach and must adhere to the principle of state sovereignty.

The immigration guarantor is obliged to report any change in civil status (such as birth, death, divorce), immigration status (such as change of passport, transfer of position, transfer of guarantor, and multiple positions), and change of address (place of residence of foreigners, and immigration guarantor). Article 63 of Law. No. 6 of 2011 confirms that the guarantor also has the obligation to pay all costs incurred in order to return or remove the guaranteed foreigner from the territory of the Indonesian state, if the foreigner:

a. The duration of his residence permit has passed; and/or

b. Subjected to Immigration Administrative Actions in the form of deportation.

According to Law Number 6 of 2011 concerning Immigration, there are 3 (three) legal subjects that can become guarantors/sponsors for foreign nationals, (Khalis 2020) the first is the husband or wife of a foreign citizen who will come to Indonesia, meaning that there has been a mixed marriage between a foreign citizen and an Indonesian citizen. Second, every Indonesian citizen can also become a guarantor/sponsor but only applies for a residence permit using a visa on arrival and a repatriation visa. Repatriation is a foreigner who is a former Indonesian citizen who wants to live in Indonesia. Third, companies can become guarantors/sponsors for foreign workers, but these companies are required to have paid-up and placed capital with a certain minimum to be able to become guarantors/sponsors (Antaraneews 2022).

In addition, the company that is the guarantor/sponsor has several responsibilities that must be carried out. These responsibilities are based on Article 63 of Law Number 6 of 2011 concerning Immigration, among others, must be responsible for the presence and behavior of foreign nationals while in Indonesia, must report any change in status or change of address of foreign nationals, then the guarantor/sponsor obliged to pay the fee arising from repatriation or return of foreign nationals if their residence permit expires or becomes the subject of immigration administrative action in the form of deportation (Khalis 2020).

Based on this article, the guarantor is burdened with the responsibility of demanding an honest attitude from the guarantor/sponsor when carrying out reports on the guaranteed foreign nationals. (Khalis 2020). The guarantor or sponsor has the obligation to carry out all administrative order provisions relating to the existence and activities of the guaranteed foreigner. As mandated in Government Regulation Number 31 of 2013 concerning Regulations for Implementing Law Number 6 of 2011 concerning Immigration, which confirms that the guarantor is obliged to report any changes in civil status, immigration status, and changes in the residence address of foreigners under his responsibility.

The guarantor must report to the Immigration Office that issued the ITAS or ITAP by submitting the ITAS or ITAP if the foreign citizen holding the ITAS/ITAP plans to leave the territory of the Republic of Indonesia and does not want to enter Indonesia again. Furthermore, for foreigners who are already outside the territory of the Indonesian state or have returned to their country and do not plan to return to the territory of the Indonesian state but their stay permit is ongoing, the guarantor of the foreigner must report to the Immigration Office that issued the residence permit so that the permit period can be terminated later. his stay.

For guarantors who want to terminate their guarantee for foreign citizens who are still in the territory of Indonesia who are ITAS/ITAP holders or foreign citizens whose ITAS/ITAP are still valid, they are required to report to the Immigration Office that issued the residence permit, so that the ITAS/ITAP can be terminated later. ITAP is a foreigner, but previously the guarantor was obliged to expel the foreigner from the territory of Indonesia (Wijayanti 2011).

### 3.2. Sanctions for Foreign Guarantor in Indonesia who commit violations

Immigration crimes can be divided into 2 (two) types, namely immigration crimes and immigration violations. Immigration crimes are emphasized on the threat of a heavier penalty in the form of imprisonment while immigration violations are in the form of threats of confinement (Purwanti 2018). In the perspective of law enforcement, the imposition of punishment for the type of immigration crime is usually carried out by investigation and then investigation and if you have sufficient evidence, the case file will be submitted to the relevant agency to proceed at the trial stage.

Immigration violation sanctions in Law no. 6 of 2011 contained in Article 116, Article 117, Article 124 letter b, and Article 133 letter e. Legal sanctions that arise as a result of violations of this article will only be processed for minor crimes because the violations committed are included in administrative violations (Purwanti 2018). The legal consequences given can also be in the form of TAK which is specifically regulated in Article 75 of Law Number 6 of 2011.

The classification of the distribution of articles governing immigration crimes based on the level of difficulty in carrying out investigations into cases of alleged immigration crimes is contained in Article 22 letter c of the Minister of Law and Human Rights of the Republic of Indonesia No. 39 of 2021 concerning Procedures for Investigating Immigration Crimes which is explained further in Article 23 paragraph (3) letter o which confirms "Articles that are alleged in difficult cases include Article 118, Article 119 paragraphs (1) and (2), Article 120 paragraphs (1) and (2), Article 121 letters a and b, Article 122 letters a and b, Article 123 letters a and b, Article 126 letters a, b, c, d, and e, Article 127, Article 128 letters a and b, Article 129, Article 131, Article 132, Article 133 letters a and b, Article 134 letter b, Article 135 and Article 136 of Law no. 6 of 2011." The criminal article in this case is included in the classification of difficult cases, and therefore it needs to be of more concern to Immigration Civil Servants in carrying out investigative

activities and proving the elements of immigration crimes must be detailed so that the resulting legal product can be legally justified.

Immigration violations are usually put more emphasis on TAK in the form of deportation than continuing at the trial stage. In Law no. 6 of 2011 concerning Immigration, it is known that the number of classifications of criminal acts contained in the sentencing article consists of 36 provisions for criminal acts; 4 provisions for criminal offenses and 3 paragraphs regarding provisions for fines for corporations (Purwanti 2018).

The absence of detailed regulations and special legal protection for a guarantor has various impacts and consequences. One of them is the lack of responsibility of a guarantor. The lack of responsibility of a guarantor is the lack of a sense of responsibility for a guarantor to oversee and monitor the activities of foreigners he guarantees in Indonesian territory, even though the Guarantor is responsible for the existence and activities of foreigners while in Indonesian territory, as defined in Article 63 paragraph (2) UU no. 6 of 2011, which regulates the guarantor's obligation to report if there is a change in civil status, immigration status and change of address, but has not regulated the guarantor's obligations for the activities of the guaranteed foreigner.

Obstacles in holding the guarantor accountable are also due to the unclear meaning of the words existence and the meaning of activities. This deficiency was then overcome by the Minister of Law and Human Rights Regulation Number 36 of 2021 concerning Immigration Guarantor which then defined what and how the guarantor meant as well as administrative sanctions for the guarantor in the event of an immigration violation by the guaranteed foreigner. However, of course in its implementation in the field, there are several obstacles that arise in law enforcement according to the norms set forth in the intended regulations, as from the results of an interview with Ario Suhermanto as the Head of the Immigration Enforcement Section said that there are still many obstacles faced by special officers in guarantor violations. foreigners such as not providing information regarding changes in status of foreign nationals, fictitious addresses given by guarantors and foreigners, lack of cooperation or coordination with guarantors and even found several cases of fictitious guarantors.

This was conveyed by Danang Triyanto and Anggi Wicaksono who were also involved in the formation meeting of the Immigration Guarantor Regulation of the Minister of Law and Human Rights that the provisions for extending guarantors were still unclear so that they could be interpreted in two ways, namely that they could be carried out the same as the initial application for registration of the previous guarantor and the provisions for extending guarantors could be regulated in implementing regulations. underneath. Anggi Wicaksono added that in the future there is not yet nomenclature that regulates the extension of the guarantor, then the extension is automatically carried out the same as repeating again, namely registration of the guarantor.



The imposition of sanctions on perpetrators of immigration acts is aimed at enforcing immigration provisions and trying to prevent and eradicate unlawful acts that can be detrimental to the state and society. The imposition of imprisonment and fines currently in effect has not been able to be comprehensive, effective and provide a deterrent effect for perpetrators and other people not to repeat the same act to suppress immigration crimes. It is necessary to improve the aspects of supervision and enforcement of immigration against activities that lead to acts violating immigration laws and regulations.

Administrative law norms that are burdensome or oblige the public to comply with regulations related to immigration certainly require good enforcement by immigration officials. It has become one entity that the government's authority in drafting laws and regulations or establishing legal norms, indirectly as well as the authority to enforce them (Berge 1996). TAK as an immigration administrative sanction is a juridical instrument that is operationalized as a method of enforcing administrative law related to immigration matters in Indonesia.

Administrative sanctions consider that an act that causes disruption to the order of administrative law norms, as a violation;

- a. Disturbances arising from violations of the order of administrative law norms, can be immediately taken action by the administrative body;
- b. Actions taken by officials or administrative bodies in order to end disturbances to the order of administrative law norms, can be in the form of remedial actions (reparatoir-herstel) and/or punitive measures (condemnatoir-straf).

If examined using a conceptual approach, there are several legal actions taken by immigration officials which normatively can be regarded as a form of imposing administrative sanctions. There are several reasons that make this action have the nature and qualifications to be said as an administrative sanction namely:

- a. Is a response to negligence or non-compliance with norms; Unilateral form of prosecution (without third party intermediaries);
- b. The mechanism for giving action such as TAK which begins with incident reports, minutes of inspection, minutes of opinions, to decisions;
- c. The form of sanctions is administrative in nature;
- d. In order to enforce administrative norms;

By analyzing the legal actions of immigration officials using the organic criteria approach of administrative sanctions and the qualifications for imposing administrative sanctions described above, a number of legal actions have been identified that qualify as immigration administrative sanctions.

- a. Withdrawal, Revocation and Suspension of DPRI (RI Passport)
- b. Revocation of guarantee access rights for foreigners (to individuals and corporations)
- c. Inclusion in DPOK

- d. Imposition of administrative fines
- e. Etc.

Administrative sanctions against immigration guarantors are contained in the Decree of the Director General of Immigration Number: Imi-0197.Gr.01.01 of 2021 concerning Procedures for Imposing Administrative Sanctions on Immigration Guarantees, namely:

- a. Written Reprimand;
- b. Administration of Administrative Fines;
- c. Termination of Guarantee Right given by the Director General; And
- d. Immigration Guidance at the Immigration Detention Center within 5 (Five) Days.

Authority for Imposing Administrative Sanctions, the Director General of Immigration carries out administrative sanctions for Immigration Guarantees based on recommendations from the directorate which has the function of supervising and enforcing immigration. Several steps must be passed in imposing sanctions, including written warnings, imposition of administrative fines and termination of guarantee rights by the Director General.

Enforcement of immigration law in the territory of Indonesia in the issue of guarantor for foreigners in Law no. 6 of 2011 there is only one article which is the legal basis for implementing law enforcement to sanction foreign guarantors who do not fulfill their obligations under the Immigration Law. The only such article is Article 118 of the Immigration Law with the legal sanctions given are imprisonment and fines, these sanctions

quite heavy when compared to the sanctions given to foreigners who are guaranteed not to fulfill their obligations which are included in light crimes.

Furthermore, if we examine Article 118 Jo. Article 63 paragraph (2) and Article 116 Jo. 71 letter a Law Number 6 of 2011 the two Articles have similarities in the aspect of the act (delict) committed by a legal subject where the obligation of each subject is regarding reporting any changes in civil status, immigration, citizenship, and address of the guarantor or guaranteed foreigners. Furthermore, the element of the act of not providing information to the Immigration Officer also has similarities between the two legal bases, but it is still not specifically regulated which subject should report this obligation to be a separate polemic for foreigners and their Guarantor in reporting information to the nearest Immigration Technical Implementation Unit.

Actions that are regulated are more administrative in nature. The heavier criminal sanctions given to foreign guarantors are the reason why law enforcement is not often carried out against foreign guarantors, especially foreign guarantors. With the similarities and looking at the discussion in this study, foreigners who violate the provisions of Article

116 can already be said to have violated the provisions of Article 118 because they do not fulfill their obligations regarding the existence of the guaranteed foreigner.

Settlement of immigration crimes prioritizes Immigration Administrative Actions in the form of administrative sanctions rather than criminal sanctions. According to Rizky Yudha Ika Wira as the Head of Immigration Intelligence and Enforcement, said that "Administrative sanctions against foreign individual guarantors at the statutory level are also wanted by Immigration PPNS so that they can provide legal strength and certainty to law enforcers in the field and of course will provide a deterrent effect." against guarantors who commit violations.

The administrative sanction in the form of immigration guidance at the Immigration Detention Center for 5 (five) days is doubtful considering the provisions for immigration guidance referred to are regulated in Article 21 paragraph (1) letter d of the Minister of Law and Human Rights of Immigration Guarantee, contrary to the provisions of Article 1 number 33 and Article 14 of the Immigration Law. This discrepancy is because Indonesian citizens cannot be placed in Detention Centers or Immigration Detention Rooms, however, if Indonesian Citizens are in doubt about their citizenship, they can be placed temporarily in Immigration Detention Centers or rooms in order to complete their Indonesian citizenship.

Matters regulated in the administrative sanction mechanism for Immigration Guarantees must be easy to understand, and easy to implement. If all administrative sanctions must go through the approval of the Director General of Immigration, it will take time in the process of imposing sanctions, which incidentally can be carried out by the Immigration Office. The time for the application of written warning sanctions is carried out within 3 working days and the imposition of fines is carried out within 10 working days so that it is less effective in its implementation.

Administrative sanctions are only given to Immigration Guarantors who do not fulfill their obligations in Article 13 of the Minister of Law and Human Rights of the Immigration Guarantee where foreigners do not commit serious crimes such as being involved in transnational organized crime, whereas if foreigners commit serious crimes and the Guarantor does not carry out their obligations in Article 13 of the Minister of Law and Human Rights Immigration can apply the provisions of Article 118 of the Immigration Law.

The results of the interview Rizky Yudha Ika Wira as the Head of the Immigration Intelligence and Enforcement Division said that there were many problems in the field related to guarantors and foreign consultants that occurred, in this case the problems that occurred with the guarantor were fictitious guarantors and guarantors who were not bona fide in accountability for existence and activities guaranteed foreigner.

Several policies related to the guarantor, among others:

1. To become an Immigration Guarantor, a person or corporation must register with the Directorate General of Immigration (such as doing verification);

2. Only after the guarantor is registered (verified sponsor) can apply for an immigration permit for foreign nationals;
3. Guarantor who has not been registered can still apply for an immigration permit until the cut-off (1 year from the issuance of the Minister of Law and Human Rights, namely on: 1 September 2022).
4. Immigration guarantors who violate their obligations and do not comply with the prohibitions may be subject to administrative sanctions;
5. Administrative sanctions can be chosen before imposing a sentence on the guarantor (ultimum remedium)

#### 4. Conclusion

Responsibilities of guarantors for foreigners in Indonesia based on Article 63 of Law Number 6 of 2011 include being responsible for the presence and behavior of foreign nationals while in Indonesia, having to report any changes in status or changing the address of foreign nationals, having to pay costs arising from repatriation or return of foreign nationals if their residence permit expires or they are subject to immigration administrative action in the form of deportation, carrying out all administrative order provisions relating to the existence and activities of guaranteed foreigners, reporting any changes in civil status, immigration status and change of residence address of foreigners under their responsibility, report if the Foreign Citizen holding ITAS/ITAP plans to leave the territory of the Republic of Indonesia and does not want to enter Indonesia again.

The Minister of Law and Human Rights Number 36 of 2021 concerning Immigration Guarantor from the differences in the sanctions given, are more administrative in nature. The heavier criminal sanctions given to foreign guarantors are the reason why law enforcement is not often carried out against foreign guarantors, especially foreign guarantors. If a foreigner violates the provisions of Article 116 then the guarantor can be said to have violated the provisions of article 118 because he does not fulfill the obligations related to the existence of the guaranteed foreigner. studies, varied country comparisons, and excellent and sharp analytical methods.

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Interview with Ario Suhermanto Selaku Kepala Seksi Penindakan Keimigrasian, pada hari Selasa (21/06/22), pukul 15.37 WIB, bertempat di Kantor Imigrasi kelas I TPI Surabaya

Interview with Anggi Wicaksono, Staff Analis Keimigrasian pada Direktorat Pengawasan dan Penindakan Keimigrasian pada hari Senin, 11 Juli 2022 pukul 12.01 WIB di Direktorat Jenderal Imigrasi.

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PAGE 1

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PAGE 2

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PAGE 3

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PAGE 4

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PAGE 5

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PAGE 6

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PAGE 7

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PAGE 8

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PAGE 9

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PAGE 10

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PAGE 11

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PAGE 12

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