

# Residence and Employment Laws applicable to Artists who are Third-Country Nationals

(as of: 2016)

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## A. The Right of Residence

The *Niederlassungs- und Aufenthaltsgesetz* [Permanent and Temporary Residence Law] (NAG) regulates the issue, refusal and revocation of residence permits for persons who are non-Austrian nationals and wish to remain in Austria longer than six months. It also applies to the documentation of already vested rights of residence<sup>i</sup>. In principle it recognises three forms of the right to remain in the country:

- a residence permit for a period exceeding six months but where the stay is nevertheless temporary,
- a residence permit<sup>ii</sup> for a long-term (permanent) stay in Austria and
- confirmation of residence (documented) based on Community laws<sup>iii</sup>.

The *BFA*<sup>iv</sup>-*Verfahrensgesetz* [Federal Office of Aliens and Asylum Matters] and the *Fremdenpolizeigesetz* (FPG) [Aliens Police Law] regulate the issuance of visas<sup>v</sup>, the use of measures to terminate residence and pre-deportation detention.

The *Ausländerbeschäftigungsgesetz* [Aliens Employment Law](AuslBG) regulates, inter alia, access to the employment market for artists who are third-country nationals and who wish to work as self-employed.

### I. Residence permits for third-country national artists

#### 1. Basics

##### 1.1 Where and how do I make the *first* application?

- In principle application a first application must be made in person at an Austrian embassy or consulate. Jurisdiction is dependent on place of residence in the country of origin. The application should be made to the relevant authorities there. From there it will be forwarded to Austria.
- Application must be made using the appropriate forms.
- Originals and copies of all required documents should also be presented at the time the application is submitted.

##### 1.2 Where, how and when do I make an application for an *extension* of the residence permit?

- At the offices of the local authority (regional, district or municipal).
- Please note: An application for an extension of a residence permit must be made BEFORE the permit has expired!

### 1.3 General requirements for issuing permit

- Proof of a right to access to accommodation in accordance with local standards.
  - Proof of health insurance that covers all risks in Austria.
  - Proof of sufficient financial means: residence may not result in a financial burden on local authorities. That is not the case on proof of the availability of at least EUR 882.78 (single person) or EUR 1,323.58 (married couple) per month (as of 2016). No application for social welfare benefits may be made. Regular fixed expenditures for rent, loan repayments, distraint and maintenance payments to persons not living in the same household that exceed EUR 282,06 /month increase the monthly amount necessary by the difference.
- There are exception for students and pupils who have not reached their 24th birthday (see 2.1.3).
- Residence must not be contrary to the public interest.
  - There must be no valid exclusion order or executable return decision in Austria and no deportation order in effect in any other EEA state or Switzerland.

### 1.4 Important addresses, links and contacts

- Forms can be found on the Federal Ministry website, [www.bmi.gv.at](http://www.bmi.gv.at) under ‘Niederlassung und Aufenthaltsrecht’ [Permanent and Temporary Stay Law].
- A list of Austrian representation (embassies and consulates) is to be found at [www.bmaa.gv.at](http://www.bmaa.gv.at) under the heading ‘Bürgerservice, Österreichische Vertretungen’ [Public Services, Austrian Representation].
- In Vienna responsibility lies with Magistratsabteilung 35 [Municipal Office 35] and can be found at [www.magwien.gv.at](http://www.magwien.gv.at) under the heading ‘Verwaltung, virtuelles Amt’ [Administration, Virtual Office]. The address for the head office is:  
Magistratsabteilung 35, 1200 Vienna, Dresdnerstraße 93 (Service centre Tel.: 4000-3535, E-mail: [post@ma35.wien.gv.at](mailto:post@ma35.wien.gv.at)).

## 2. Possible Residence Permits for Artists who are Third-Country Nationals

### 2.1. Residence Permit

#### 2.1.1. Basics

- Residence permits are intended for temporary stays in excess of six months. Such a stay is not classified as permanent under the NAG.
- In principle the first application must be made in the country of origin.
- No quotas apply to residence permits.
- Issue of the residence permit is bound to a stay on the ground(s) specified in it.
- It is possible to change the ground(s) on which a residence permit has been granted provided the conditions for the new ground(s) are met.
- Permanent residence cannot be achieved by means of (multiple) residence permits nor is it possible to obtain *Aufenthaltsverfestigung* [enhancement of the right to stay] in this way. *Aufenthaltsverfestigung* is relevant in cases of forced return. The first stage of *Aufenthaltsverfestigung* begins when the person is legally resident in the country for an unbroken period of at least five years. In that case a forced return order can only be made on specific and very limited grounds.
- Residence permits are issued for a maximum of one year and may be extended here in Austria.

### 2.1.2 Residence permits for artists (S.61 NAG)

- The general conditions for issuing a residence permit must be met.
  - It is acceptable to fulfil the conditions relating to place of residence, living costs and health insurance with a written guarantee (*Haftungserklärung*). This guarantee is a document authenticated by a court or public notary in which a third person declares responsibility for all costs relating to the stay in Austria including living costs (rent, food etc.), health insurance and any deportation costs. Any such guarantee is valid for 5 years. The person providing the guarantee must also prove their ability to take on such a responsibility.
  - In the case of paid employment, permission must be granted by the regional offices of the *Arbeitsmarktservice* (AMS)[Employment Office] under S. 20d ss. 1 Z 6 AuslBG.
  - In the case of self-employed work, the activity must consist mainly of art-related work. Living and incidental costs that must be met must derive from the income generated by the artistic activity.
  - *Familiennachzug* [family reunification] is possible.
  - In the case of artists in paid employment, the application may also be made by the employer in Austria.
- After a period of five years of continuous and legal residence under an Artist Residence Permit, a *Daueraufenthalt EU* [permanent EU residence] may be issued when all applicable conditions are met.

### 2.1.3. Residence permits for students (§64 NAG)

- General conditions relating to residence permits must be met.
- The sum of EUR 487.53 per month is regarded as proof of sufficient funds to cover living costs for single students up to their 25th birthday. From that date one it is necessary to prove income of EUR 882.78 per month. (as of 2016).<sup>vi</sup>
- A written guarantee is acceptable (as above).
- The study must be a normal or external course offered by a university, technical university, accredited private university, teacher training college, a recognised private teachers training college or a recognised private course of study. The university course may not be designed solely for the acquisition of a language.
- In order for the permit to be issued a *Studienerfolgsnachweis* [confirmation of course completion] which shows 16 ECTS per academic year.
- Paid work may be undertaken as long as it does not interfere with the demands of the course which remains the only ground for the stay in Austria. The work must also be allowed under the AuslBG.
- A switch to the *Rot-Weiß-Rot Card* (not limited by quotas) is permissible (see: 2.2.2 below)
- Family reunification is possible.

## 2.2. Rot-Weiß-Rot-Karte [Red-White-Red Card]

### 2.2.1. Basics

- For a stay in Austria that is neither temporary nor for a limited period.
- The *Rot-Weiß-Rot-Karte* is also dependent on a designated ground for the stay.<sup>vii</sup>
- A minimum number of points must be achieved. In the main these are given for education, professional/job experience, age and language skills. The points system does not apply to graduates.
- There must be a job available (except for self-employed, key personnel) which generates a stipulated, regular minimum income.
- In the case of self-employed key personnel it must be proved that the activity is of general economic benefit with special attention being paid to any transfer of investment capital and/or the creation or preservation of jobs.

- In principle the first application must be made from outside of Austria. There are, however, exceptions such as when the applicant is the holder of a *Aufenthaltsbewilligung Studierende* [student residence permit] or is in Austria under a visa-free arrangement or where they are the holder of a job-seeker's visa. An application can also be made in Austria by the employer.
- After at least twelve months a transfer to the *Rot-Weiß-Rot-Karte Plus* [Red-White-Red Card Plus] or *Niederlassungsbewilligung* [permanent residence permit] is possible.
- Stays under the *Rot-Weiß-Rot-Karte* leads, in stages, to a strengthening of residence status (see: 2.1.1).
- Indefinite stays i.e. permanent resident status (*Daueraufenthalt EU* [EU permanent resident]) is possible after five years of continuous and legal residence.
- Family reunification is possible.

### **2.3 Permanent Residence/Rot-Weiß-Rot-Karte plus**

- May be considered after a *Rot-Weiß-Rot-Karte*.
- For stays in Austria that are not only temporary.
- The general requirements for issue must be complied with.
- Periods of residence lead to *Aufenthaltsverfestigung* [strengthening of resident status] (see 2.1.1).
- The *Rot-Weiß-Rot-Karte plus* allows free access to the labour market.
- Family reunification is possible.

## **II. Required Documentation**

### **1. What is required for every application?**

- 1 Passport photo;
- a valid passport (minimum validity one year);
- birth certificate (for first applications);
- extract from criminal records of country of origin (in the case of first applications not older than three months);
- marriage certificate, registered partnership certificate, divorce decree, adoption decree, death certificate etc. where relevant;
- proof of the right to reside in a place that complies with local standards (lease, sub-lease, certificate of house ownership etc.);
- proof of health insurance that covers all risks e.g. policy. A travel insurance policy is *not* sufficient.
- proof of secured living costs e.g. with
  - wage slip, work contracts, binding contract for project, proof of the right to a pension, annuity or other vested right from an insurance benefit, income tax return, scholarship or binding preliminary work contract etc.
  - proof of savings, e.g. by means of account statements, savings book
- in the case of a residence permit for students or artists it is possible to satisfy requirement with a declaration of guarantee.
- extract from the Kreditschutzverband records [oversees legal aspects of credit etc. obligations]

### **2. What is additionally required for an artist residence permit?**

- where the person carrying out the activity is not as self-employed, a written confirmation from the AMS. This will be obtained by the authority responsible for the issue of the residence permit;

- in the case of self-employed work, work contracts, written confirmation of orders etc.;
- proof of art education (degree, diploma, references) or a description of previous artistic work.

### **3. What is additionally required for a student residence permit?**

- written confirmation of an acceptance to study at a university, technical university, college etc.
- in the case of an application for an extension, proof of successful study, especially a *Studienerfolgsnachweis* [transcript of academic record] as defined in §75 Universitätsgesetz 2002 [section 75 of the University Act 2002]

### **4. What is additionally required for a Rot-Weiß-Rot-Karte [Red-White-Red Card]?**

- employer’s declaration (there are pre-printed forms);
- proof of university graduation or at least *Universitätsreife* [fulfilment of university acceptance requirements] or proof of completion of a course leading to a professional qualification;
- proof of proficiency in German and, if relevant, English;
- proof of previous relevant work experience (where needed) (job verification, job references etc.);
- depending on the category for which the application is made other confirmatory documents may be necessary (general key personnel, graduation, highly-qualified specialist personnel in a sector with a shortage of personnel).

## **B. Employment Law**

### **1. Work as an employee**

1.1 Employment of persons who are not Austrian citizens is regulated by the AuslBG [Aliens Employment Law].

Basically, before beginning a job permission must be obtained from the AMS. There are exception to this contained in §1 Abs 2 lit. i) AuslBG: people (including their spouses, registered partners, and children) engaged scientific activity in public or private institutions or enterprises in the fields of research and teaching, in the development and propagation of the arts as well as teaching in the field of art. They do not require permission from the AMS. Recognised asylum seekers, dependents, EU/EEC citizens and listed relatives of EU/EEC or Austrian citizens do not require permission under the AuslBG either.

In addition there are various residence permits such as the Rot-Weiß-Rot-Karte plus [red-white-red card plus] that already include a work permit that conforms to the AuslBG.

1.2 For gainfully employed artists from third states who are not self-employed a ‘one-stop-shop’ procedure is envisaged: the residence permit issued includes an employment permit for a specified employer. Sicherungsbescheinigungen [conditional assurances] and Beschäftigungsbewilligung [employment permits] will no longer be issued.

The application for a residence permit for employment as an artist must be made to the authority responsible for residence. They will then forward the application to the AMS to complete the authorisation procedure. After a hearing of the regional committee, the AMS is obligated to inform the authority responsible under the NAG that the conditions for an accreditation as artist under section 14 have been

met. This must be done within 4 weeks in writing.

Thus whether work falls within the category of artistic activity is assessed by the AMS itself. However, the AMS may not allow judgments of the value of the artistic activity nor artistic quality of the artist to overly influence them. Furthermore they must take into account whether the result of a refusal of accreditation might lead to the impossibility of practicing art. If there is any reasonable doubt then the person desiring to practice art must prove its plausibility.

If the AMS comes to the conclusion that the conditions have not been met then the application will be rejected. The decision may be appealed within four weeks of the date it was received.

**PLEASE NOTE: A residence permit issued under these conditions restricts work to the employer named in the application and to the work specified in it. Apparently any change necessitates a new application.**

In the opinion of the *Bundesministerium für Arbeit, Soziales und Konsumentenschutz* (BMASK) [Federal Ministry of Employment, Social affairs and Consumer Protection] should artists who are employed under the artist residence permit change employers, then the new employer must make a new application. The same applies in the case of additional employment. However, in the case of multiple accredited employment, there will often not be sufficient space to list all employers in the permit.

1.3 Specially and highly-qualified key personnel/ graduates and those where there is a personnel shortfall in their specialty have the right to practice their speciality with one employer. This is implicit in their Rot-Weiß-Rot-Karte.

1.4 In principle students may take paid employment during their studies so long as it does not exceed 10 hours per week (for those who have completed the initial stage of a diploma study) or 20 hours per week (after completion of a bachelor degree). However, the employer must first be issued with a *Beschäftigungsbewilligung* [work permit] by the AMS.

## **2. Self-employed work**

Self-employed work does not require a work permit under the AuslBG. If there is any doubt as to whether the activity is self-employed or not, a *Feststellungsbescheid* [declarative statement of status] may be obtained from the AMS.

## **C. What else must I take into consideration?**

### **1. What can I do if the authorities refuse to accept my application?**

The authorities are under a duty to accept and process all applications including those that are hopeless from the outset. Should it nevertheless be refused, the application should be sent to the appropriate authority by registered mail.

### **2. What should I do if I am notified by the post office that there is a letter for me there?**

The letter being held at the post office should be picked up as soon as possible because any time limits begin to run from the date on which notice was given. While the post office will hold the document for at least two

weeks, any time limits begin to run from the first day the letter was deposited. Documents held by the post office are regarded as delivered from the first day on. Delay in picking up the letter means that important deadlines may be missed.

### **3. What can I do when my application is unsuccessful or the right to remain is granted in a form other than that applied for?**

A negative decision can be appealed. The time for doing so expires four weeks after receipt of the letter or the notification that the post office is holding a letter for you (see 2. above). You do not need legal representation to lodge an appeal but it is advisable to seek expert opinion.

### **4. What can I do if the appeal is also rejected?**

If the appeal is also rejected a further appeal can be made within six weeks (from receipt of the rejection - see 3. above) to the *Verfassungsgerichtshof* [Constitutional Court] and/or the *Verwaltungsgerichtshof* [Administrative Court]. In both cases you will need legal representation. If you are financially unable to meet the costs of legal representation you may apply (within the six-week time limit) for legal aid. Forms can be downloaded from [www.vfgh.gv.at](http://www.vfgh.gv.at) and [www.vwgh.gv.at](http://www.vwgh.gv.at).

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- i EEA citizens (EU, Iceland, Liechtenstein, Norway) together those of Switzerland have a right of free movement. In principle they may stay in Austria without special permission. However, since 1.1.2006 if they remain longer than three months they must register with the authorities and will receive an Anmeldebescheinigung [confirmation of registration]. For those who were already registered by 1.1.2006, their Meldezettel [registration of place of residence] is sufficient.
  - ii Rot-Weiß-Rot-Karte, Rot-Weiß-Rot-Karte plus, Niederlassungsbewilligung [permanent residence permit], Aufenthaltstitel Daueraufenthalt EU [permanent residence EU permit], Familienangehöriger [family members] und Daueraufenthalt Familienangehöriger [permanent residence permit for family members], Blaue Karte EU [EU blue card], Niederlassungsbewilligung-ausgenommen Erwerbstätigkeit [permanent residence permit excluding paid employment ], Niederlassungsbewilligung-Angehöriger [permanent residence permit for family members].
  - iii Anmeldebescheinigung [confirmation of place of residence], Bescheinigung des Daueraufenthalts [confirmation of long-term stay], Aufenthaltskarte [residence card], Daueraufenthaltskarte [long-term residence card].
  - iv BFA - Bundesamt für Fremdenwesen und Asyl [Federal Ministry for Aliens and Asylum Matters]
  - v Visa are intended for stays of less than six months.
  - vi The amounts here are also calculated according to the Ausgleichszulage. These, too change annually.
  - vii Specially and highly qualified personnel, other key personnel, graduates, specialists where there is a labour shortage.