

RESIDENCE AND EMPLOYMENT LAW FOR ARTISTS WHO ARE CITIZENS OF THIRD STATES AS OF 1.1.2006

A. RESIDENCE LAW – NEW LEGAL POSITION AFTER 1.1.2006

On 1.1.2006 important changes in the law relating to foreigners have come into effect. The Fremdengesetz [The Aliens Act] 1997 (FrG 1997) which had been in force till then has largely been repealed and replaced by the Fremdenpolizeigesetz [Aliens Police Law] (FPG) as well as by the Niederlassungs- und Aufenthaltsgesetz [Settlement and Residence Law] (NAG).

Amongst other things the FPG regulates the issue of visas¹, measures to terminate residence (deportation and exclusion orders) and pre-deportation detention.

The NAG regulates the issuance, refusal and withdrawal of residence permits for persons who are not citizens of Austria² and who wish to remain in Austria for longer than six months as well as the documentation of vested rights of residence and settlement. Basically it recognises three forms of the right of residence: a right of residence for more than six months but which is nevertheless only temporary and the right of settlement which envisages permanent residence in Austria and a residence permit sui generis³.

I. RESIDENCE PERMITS UNDER THE NAG FOR ARTISTS WHO ARE CITIZENS OF THIRD STATES AFTER 1.1.2006

1. BASICS

- Where and how can I make a *first application*?
 - At the Austrian diplomatic representation (embassy, consulate). Jurisdiction is determined by place or residence in country of origin. Applications are passed on to the appropriate authorities (local or municipal authorities: Bezirkshauptmannschaft or Magistratsabteilung) in Austria.
 - In principle the application must be made personally.
 - It must be made using the application forms intended for the purpose.
 - In making the application documents must be provided as originals and as copies.

¹ Visas are only intended for stays in Austria of no longer than six months.

² Citizens of the EWR (EU, Iceland, Lichtenstein, Norway) as well as citizens of Switzerland also have the right of Freizügigkeit. Thus in principle they are allowed to remain in Austria indefinitely without special permission though after 1.1.2006 if they remain for longer than three months they must report to the authorities and are issued with a document certifying that fact. For those who were already registered in Austria prior to 1.1.2006, the residence registration card is sufficient.

³ In addition there is the right “permanent residence EG”, “family members” and “permanent residence for family members”.

- Where and how can I make an application for *an extension*?
 - At the offices of the local or municipal authorities (Bezirkshauptmannschaft or Magistratsabteilung). In Vienna this is Magistratsabteilung 35.
 - The appropriate forms should be used.
 - **ATTENTION:** After the 1st of April 2009 the application for an extension must be made BEFORE the current residence permit has expired. There is a transitional period until the 30th of June 2009.

- Important addresses, links and offices
 - Forms are available on the Federal Ministry of the Interior (BMI) web site www.bmi.gv.at under the heading Fachbereich > Niederlassung und Aufenthaltsrecht
 - A list of diplomatic representation offices can be found at www.bmaa.gv.at under the heading Bürgerservice > Österreichische Vertretungen
 - The appropriate office in Vienna is the Magistratsabteilung 35 which can be found at <http://www.wien.gv.at/verwaltung/personenwesen> and also at:
Magistratsabteilung 35 – Fremdenrechtliche Angelegenheiten
1200 Wien – Dresdnerstraße 93
Servicezentrum Tel 4000-3535
Email service@ma35.wien.gv.at

2. POSSIBLE RESIDENCE PERMITS FOR ARTISTS WHO ARE CITIZENS OF THIRD STATES UNDER THE NAG

2.1. Residence permit

2.1.1 Basics

- For temporary stays in Austria *in excess* of six months.
- Residence permits are always dependent on a particular reason for the stay. In principle it is possible to change the reason for the stay providing conditions for a new reason for staying are fulfilled⁴.
- Provisions correspond to the residence permit under the FrG 1997.
- First applications should be made from outside the country.
- The residence permit is not subject to quotas.
- The permission to stay in Austria must not represent a danger to public order or safety and in particular there must be no exclusion order in force for Austria or any other EWR country and no final order of deportation in force issued within the last 12 months under § 54 FPG bzw § 10 AsylG .
- The stay may not result in a financial burden for central, regional or local authorities. This is deemed not to be the case when, at present (2007), the sum of EUR 772.40 per month, for a single person, is available for their support⁵. For 2009 for married

⁴ Often x a quota place will be necessary.

⁵ According to the Ausgleichszulagenrichtsatz (the compensatory allowance rate). This changes every year.

couples the amount is EUR 1,158.08 per month. NOTE: Exceptions for students and pupils (2.1.3).

- With this residence permit neither permanent residence nor settlement is possible. Settlement is important in the case of a deportation order or an exclusion order. The first stage of settlement (indefinite leave to remain in the country) begins with a stay of over 5 years with a residence permit. Thereafter deportation or exclusion may only be imposed on a specific, limited number of grounds.
- Residence permits are granted for a maximum period of one year and may be extended whilst in the country.

2.1.2 Residence permits for artists (§61 NAG)

- This replaces the old residence permit and the right of settlement for artists under the FrG 1997.
- The intended occupation must be concerned with art, dealing predominantly with tasks that are art-related. This includes all forms of artistic activity.
- The applicant must be able to support themselves from the income produced by their artistic activity. Proof of a secured income by means of a *written declaration* is allowed. The *written declaration (guarantee)* is a declaration by a third party that they will be financially responsible for all costs relating to the alien's stay including costs for support, accommodation, social insurance, pre-deportation costs etc. It must be attested to by a court or notary. This guarantee must be given for a minimum period of 5 years. The guarantor must be able to prove that they have sufficient income or assets.
- PLEASE NOTE: according an implementation order under the NAG, as of Jan 1st 2006 a settlement permit for artists under the FrG 1997 remains valid as a residence permit for artists. It may only be extended as such except where the indefinite leave to remain (settlement) had already been in effect for a continuously period of least 5 years prior to Jan 1st 2006. In this case a renewal application should be made under the provision for "permanent residence/settlement permit EG".

Should the five year period have been completed after Jan 1st 2006 the renewal application can still be made for a "permanent residence/settlement permit EG". The argument in this case is based on the fact that since Jan 1st 2006 nothing relevant to the permanent residence/settlement has changed and that according to European legal provisions⁶ periods of residence under a residence permit for "artists" have to be taken into account for the Austrian "permanent residence/settlement permit EG".

Should leave be given to stay in the form of a simple residence permit, an appeal should be lodged (c.f. below C.3.) The decision in a test case that is presently being heard in the Administrative Court is outstanding. The legal downgrading of the right of settlement to a simple right of residence was challenged in the Constitutional Court (VfGH). However the court assessed the pending action as unobjectionable as far as the constitution is concerned and refused to hear the substantive arguments.

⁶ Guidelines 2003/109/Council of the EG 25.11.2003 with regard to long-term third-state residents. However the guidelines provide for exceptions. Periods of study or professional training, eg. Do not count towards the five-year period. At the most 50% will be taken into consideration. However there is no provision that would prevent a holder of a residence permit for artists from obtaining the status of a long-term right of residence.

2.1.3. Residence permits for students (§64 NAG)

- Replaces the previous residence permit for students under the FrG 1997.
- An ordinary or extraordinary course of studies at a university or accredited private university or technical college of higher education or attending a university course which is not solely concerned with language learning must be proved.
- In order for an extension to be granted a certificate of success in the course of study must be produced.
- The proof of support can also be satisfied by a *Haftungserklärung* (a declaration of guarantee) (see: 2.1.2). Proof of support is deemed to have been provided in this case when an income of EUR 426.57 per month can be shown (for students and pupils under 24) or EUR 772.40 per month (over 24).⁷
- A switch to a quota-free permanent residence/settlement permit for highly-skilled migrants (see: 2.2.2) following successful completion of the course is possible.
- Residence permits for partners and children is possible.

2.2 LEAVE TO REMAIN PERMANENTLY /SETTLEMENT

2.2.1 Basics

- For non-temporary but fixed-duration long term stays in Austria.
- Leave to remain indefinitely is also dependent a particular reason for staying. A change of reason is possible in principle when the conditions for the new reason for staying are fulfilled.
- Leave to remain indefinitely (settlement) is subject to quota regulation. Please note that there are some exceptions.
- First application must normally made from outside Austria. There are, however, exceptions. The application can be made in Austria when a person with a student residence permit wishes to remain here indefinitely /settle as a highly-skilled worker after successfully completing the course; when the person has been allowed to enter to the country without a visa, during a visa-free residence; when the person is a spouse or the under-age child of an Austrian citizen; the person is an EWR citizen or a citizen of Switzerland; after their lawful entry and during a lawful stay.
- The stay may not endanger public order or safety and in particular there can be no valid exclusion order in force in Austria or any other EWR state nor any final deportation order issued in the previous 12 months.
- The stay may not result in a financial burden for local or regional authorities (see: 2.1.1).
- Stays with leave to remain permanently lead in steps to Aufenthaltsverfestigung (permanent settlement) (see: 2.1.1.).
- It is possible to acquire an unlimited permanent settlement (Daueraufenthalt EG) after 5 years of continuous, permanent residence.

⁷ According to information from the Magistratsabteilung 35. The amount is adjusted annually.

2.2.2 Indefinite residence/settlement for highly-skilled employees (S.41 NAG)

- Highly-skilled workers are those who have training or special knowledge or abilities and have the appropriate job experience required by the labour market in Austria and will receive a monthly gross income of at least EUR 2,412.00⁸ (as of 2009) exclusive of special payments for the intended occupation.

In addition at least one of the following conditions must be fulfilled:

the intended employment has of special interest for the region or section of the labour market over and above the interest of the employing company

or

the intended employment helps to create new work places or helps in securing existing work places

or the person exercises a decisive influence on the running of the company (executive function)

or

the intended employment will result in the transfer of investment capital to Austria

or

the person is in possession of a qualification from a technical college or higher technical college or another qualification demonstrating specialist knowledge.

- Leave to stay indefinitely (settlement) is subject to quotas.
- Application may be made while in the country where the applicant is entitled to enter Austria without a visa.
- Residence permits for partners and children are possible.

II. NECESSARY DOCUMENTS

1. What is required for every application?

- 1 Passport photo
- valid passport
- birth certificate (for first application)
- proof of a clean criminal record from country of origin (for first applications it must be current: no older than three months).
- marriage certificate, divorce decree, certificate of adoption, death certificate etc. as appropriate
- proof of a right to accommodation (lease, sub-lease, ownership title etc.)
- proof of health insurance that covers all risks while in Austria, e.g. by presenting the policy. A travel insurance policy does not satisfy this requirement.
 - Proof of a secured income/ sufficient support e.g. by producing a pay slip, contract of employment, proof of a pension, annuity or other claim to payment from insurance, an income tax assessment, scholarship
 - Proof of savings by means of statements of account or savings books
 - In the case of a residence permit for students or artists this may be by means of a guarantee
- integration agreement (first applications)

⁸ 60 % of the maximum category for contribution assessment according to S.108 para. 3 ASVG. Adjusted annually.

2. What else do I need to obtain leave to stay as an artist?

- for work as an employee a Sicherungsbescheinigung (requirement certificate issued by the Employment Office), Beschäftigungsbewilligung (work permit)
- for self-employed work relevant contracts and written commissions
- proof of education in the arts (degree, diploma) or description of previous artistic work

3. What else do I need to obtain leave to stay as a student?

- written proof of acceptance for a course at a university (if private, accredited) or technical college of higher education or a course of university studies
- proof of successful completion of course and in particular a Studienerfolgsnachweis (proof of intermediate course completion) as defined in Sect.75 Universitätsgesetz 2002

4. What else do I need to obtain leave to stay as an employed highly-skilled worker?

- Arbeitgebererklärung (employer's declaration) and Arbeitgeberbeiblatt (employer's declaration supplement) in accordance with the Ausländer-beschäftigungsgesetz (AuslBG) (Aliens Employment Law)

B. EMPLOYMENT RIGHTS

1. Employees

Employment, other than self-employment, of persons who are not Austrian citizens is regulated by the Ausländerbeschäftigungsgesetz (Aliens Employment Law) (AuslBG) Under S4a of the AuslBG in the case of a non-self-employed artistic occupation there is a legal right to a Beschäftigungsbewilligung (temporary work permit issued for a maximum of one year). The AMS (Employment Office) makes an assessment as to whether or not the activity is within the category of artistic. The employer must submit the application for the Beschäftigungsbewilligung (temporary work permit).

Periods in which the artist works under a valid Beschäftigungsbewilligung will not be taken into account when applying for an Arbeiterlaubnis (personal work permit with free choice of employer in the province in which it is issued, valid for two years) or for a Befreiungsschein (personal work permit with free choice of employer anywhere in the country, valid for five years) (§ 14 AuslBG).

If the artist has been recruited abroad the employer must apply for a Sicherungsbescheinigung (requirement certificate) from the AMS (Employment Office).

According to S.1 para. 2(i) of the AuslBG⁹ persons (and their partners in marriage and children) engaged in public and private institutions in work relating to research or teaching in science, in the development and propagation of art, as well as teaching art, are exempted from the AuslBG provisions. They do not require special consent from the AMS.

Recognised refugees and subsidiary protected persons¹⁰, citizens of the EEA and certain relatives of EEA citizens/Austrian citizens do not, in general, require consent under the AuslBG and have free access to the job market.

Persons from the so-called „new“ EU states are subject, however, to transitional provisions under S32a of the AuslBG and thus have free access to the job market only if they fulfil specific conditions.

When a highly-skilled professional has an unlimited right of residence they have the right to work in their field. Further consent of the AMS is not required.

In principle students may accept employment while they study. However the employer must have been issued with a work permit from the AMS before the student starts work.

2. Self-employment

Self-employed persons do not require a work permit from the AMS. Should there be any doubt as to whether a particular activity is classified as self-employment, application can be made to the AMS for a Feststellungsbescheid (an official declaration).

In this case the Gewerbeordnung (laws relating to trade and commerce) should be borne in mind.

C. WHAT ELSE MUST I TAKE INTO CONSIDERATION?

1. What can I do when the authorities refuse to accept my application?

The authorities are under a duty to accept all applications (including those that are hopeless from the beginning) and to process them. Should they nevertheless refuse the application it should be sent by registered mail to the appropriate authority.

2. What should be done when 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 deadlines begin to run from the date on which the notice was given. Delay in picking up the letter means that important deadlines may be missed.

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

⁹ Since 1.1.2008

¹⁰ Since 1.1.2008. Independent of how long they have had the status.

In this case an appeal can be lodged against the part of the decision communicating the rejection. The deadline for this is two weeks after delivery or receipt of the notification that the post office is holding a letter for you. (e.g. delivery on May 11th, expiry of time on May 25th).

Example: A Niederlassungsbewilligung (indefinite term residence/settlement) was applied for but an Aufenthaltsbewilligung (temporary residence permit) for artists was granted. In this case, a first instance appeal can be lodged within two weeks of the Aufenthaltsbewilligung (temporary residence permit) being issued on the grounds that a Niederlassungsbewilligung (permanent residence/settlement) has not been issued. The Aufenthaltsbewilligung (temporary residence permit) remains valid so that despite the appeal residence is and remains legal.

There is no duty on the applicant/appellant to use a lawyer but it is advisable to obtain expert advice.

4. If the appeal is also rejected, it is possible, within six weeks, to lodge a complaint with the Constitutional or Administrative Court. Legal representation is mandatory. If the complainant cannot afford legal representation application can be made for legal aid. This must also be done within six weeks. Application forms can be found at: www.vfgh.gv.at (Constitutional Court) and www.vwgh.gv.at (Administrative Court)

GUIDELINES
by Mag.a Doris Einwallner on behalf of
IGBILDENDEKUNST
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