

AFAO Factsheet

Applying for permanent residence in Australia Information for people with HIV and their advisors



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This factsheet provides general information about how an HIV positive diagnosis may affect your own or a family member's application for permanent residence in Australia. The policies are quite complicated and the process of applying for a permanent visa for someone with HIV can be daunting. The best approach is to get professional advice, either from a migration agent or lawyer. Contact details for getting advice and help are listed at the end of this factsheet.

The information in this factsheet is designed to help you to understand how Australian migration law operates for people living with HIV. The information in the Factsheet does not constitute legal advice and the Australian Federation of AIDS Organisations cannot assume responsibility for the consequences of any errors in this guide.

Can a person who is HIV positive migrate to Australia?

Yes they can, but only in certain circumstances. Generally, individuals with HIV applying for permanent visas do not pass the health requirement test, but may be granted a permanent visa following that, under the 'waiver' provisions. These policies are explained in this information sheet.

Australian migration law is contained in the Migration Act 1958 and the Migration Regulations 1994, which set out the various visas available for permanent residence and temporary stays in Australia. People wishing to live permanently in Australia who are not Australian citizens must obtain a permanent visa. Permanent visa classes include partner, skilled, permanent protection, etc.

Health Requirement

The Australian immigration system has very strict rules for people applying for permanent residence, including rules regarding health and disability. These rules are referred to as the “**health requirement**”. The health requirement applies to all people applying for permanent visas except to on-shore applicants for permanent protection visas i.e., individuals seeking asylum. The health requirement applies to the main visa applicant and also to family members included in the application. Generally, a person and all family members included in a permanent visa application must satisfy the health requirement. Where any member of the family fails the health requirement, the whole family will be refused permanent residence.

Despite the fact that HIV positive status does not in itself mean that a person will automatically be denied a permanent visa, most people with HIV fail the health requirement. The main reason for this is that the cost of antiretroviral therapy (ART) over a person’s lifetime is generally considered to be “significant”.

If you or a member of your family is HIV positive and has failed the health requirement, the Department of Immigration and Citizenship may be able to change the decision. This is called “waiver”. The health requirement can be waived on compassionate grounds in individual cases but only for some visa sub-classes. If a waiver is refused, you may have the right to appeal the decision.

For further information about the health requirement, the Department of Immigration and Citizenship has a factsheet entitled *Health requirement for permanent entry to Australia*, available at: <http://www.immi.gov.au/allforms/pdf/1071i.pdf>

HIV tests – who must be tested?

All permanent visa applicants **aged 15 years or over** are required to have an HIV blood test. Members of a permanent visa applicant’s family who are over 15 and listed as dependants on the visa application are also required to be tested.

Children under 15 are tested for HIV, where they applying for a permanent visa or where they are included as dependants on an adult’s application, if:

- they are to be adopted by an Australian resident; or
- they have had blood transfusions; or
- it is clinically indicated (i.e., where there are other grounds to indicate that the child may be HIV positive).

Although on-shore applicants for protection visas are not subject to the health requirement, they must undergo a health check which includes an HIV test. HIV positive status will not affect the decision whether to grant a permanent protection visa.

For people applying for permanent residence from outside Australia (“off-shore”), the blood test is conducted by a doctor approved by the Australian Department Of Immigration and Citizenship. For people applying for residence from within Australia (“on-shore”), the test is conducted by a doctor engaged by Health Services Australia.

The Health Requirement as it applies to people with HIV

The only disease or condition which currently automatically results in the refusal of a visa for migrants and off-shore refugees is active tuberculosis (TB). Rejection of applications for people with active TB is made under the Public Health Criteria of the Migration Regulations. Applicants with other diseases or conditions (including diseases and conditions which are disabilities, such as HIV), are potentially eligible for most visa sub-classes - subject to either meeting the health requirement or having the health requirement waived. Perceived risk to public health is not generally an issue for permanent visa applicants who are HIV positive, unless they also have active TB.

For migrants and off-shore humanitarian and refugee applicants with HIV (and for the other family members on the same visa application), the main health requirement issue is the estimated future cost of antiretroviral medication and health care. This is because of the test that the Department of Immigration and Citizenship must apply. In this factsheet we refer to this test as the “**cost/prejudice**” assessment.

Where a visa applicant or family member is HIV positive, the cost/prejudice assessment involves the Department of Immigration and Citizenship considering the person’s likely lifetime health care and community service requirements in Australia in relation to their HIV positive status. They will fail the test if the Department considers that providing health care and community services would either:

- result in a **significant cost** to the Australian community; or
- **prejudice** other people’s access to Australian health care or community services.

Since the commencement of current scheme there have been a few appeals highlighting inadequacies in cost/prejudice assessments. However, most people with HIV still fail the health requirement initially.

Waiver

The Health Requirement may be waived for some visa classes, where there are “**compassionate grounds**” to do so, and where granting permanent residence to the person would be unlikely to result in:

- **undue** prejudice to the access to health care or community services of any Australian citizen or permanent resident; or
- **undue** cost to the Australian community.

The health requirement can only be waived if the person meets all the other criteria for granting of the visa or entry permit applied for. The health requirement cannot be waived where the person is assessed as representing a risk to public health or safety in Australia (e.g., if the person has active TB).

Factors that may be taken into account when determining whether cost/prejudice would be “undue” may include potential hardship if the person is returned to their country of origin, the impact on their relationships in Australia, and their state of health.

The health requirement may be waived in certain circumstances set out in the regulations. Waiver is only available for a very limited number of **visa classes**, including:

- partner (includes de-facto, opposite sex or same-sex) of an Australian citizen or permanent resident;
- fiancé(e)
- dependent child of an Australian permanent resident or citizen;
- resolution of status;
- refugee and humanitarian visas granted overseas; and
- temporary humanitarian stay

If you are HIV positive and applying for a permanent visa, check with your migration agent or the Department of Immigration and Citizenship to confirm whether the waiver is available for the class of visa you are applying for.

If your application is in one of the classes where waiver is available and the Department of Immigration and Citizenship decides that you do not meet the health requirements, it must consider waiver. This is an integral and necessary part of the Department’s decision-making process.

Waiver – what is “undue cost”?

In order to consider waiver, a Medical Officer for the Commonwealth within the Department of Health and Ageing makes an estimate of the overall lifetime cost to Australian public funds of treatment, care, social services, housing etc for the particular applicant under consideration. The Department of Immigration and Citizenship then decides whether the cost estimated would unduly prejudice Australians’ access to health care and community services, or otherwise represent an undue cost to the Australian community.

In making this decision, Departmental officers weigh such matters as:

- The merits of the case including any compelling circumstances and the strength of any humanitarian or compassionate factors. In the case of spouse visas, compassionate circumstances should be additional to the fact that there is a genuine relationship between the applicant and sponsor.
- The extent of social welfare, medical, hospital or other institutional or day care likely to be required in Australia.

- The educational and occupational needs of, and prospects for, the applicant in Australia over the whole period of intended stay.
- The potential for deterioration in the applicant's state of health, taking into account not only the known medical factors but influences such as the strains of adjustment to a new environment, lifestyle, occupation and so on, as relevant to the visa class and the individual.
- The overall lifetime charge to Australian public funds.
- The willingness and ability of a sponsor, family member or other person or body to provide care and support at no public cost. In this regard, it needs to be recognised that commitments such as private health insurance or financial undertakings do not thereby exclude the possibility of public cost.
- Factors preventing the sponsor from joining the applicant in the applicant's own country.
- Whether there are Australian children of the relationship who would be adversely affected by a decision not to waive.
- The location and circumstances of family members of the applicant and sponsor.
- The immigration history of the applicant and sponsor, including compliance to date with any requirements and undertakings.

What evidence may be useful?

If you are aware of your HIV positive status when applying for a visa, it is important to include as much evidence as possible with the visa application to highlight compassionate grounds for granting residency to you, and to show that granting you a permanent visa would not impose an "undue" cost on the Australian community. If you fail the health requirement the Department of Immigration will give you the opportunity to provide evidence before a waiver decision is made but if possible it is preferable to include this material when you first lodge your application.

Whether providing evidence with your application, or later, ensure that the following is covered if possible:

Your current health situation

- What is your current health situation? (A detailed report from your own treating doctor would be useful).
- How long have you been HIV positive?
- Are you currently receiving any treatment?
- What is your prognosis?
- What standard of health care, accommodation etc. would be available to you in your country?

Health situation in your home-country

- What is the situation for people with HIV in your home country? Is there persecution of or discrimination against people with HIV in your home country? If so, is there independent evidence to support this?
- Is treatment readily available in your home country?

Community/family attitudes to HIV

- Does your family know that you are HIV positive?
- If you are gay, what is the situation for gays in your home country?
- If you are a woman, what is the situation for women with HIV in your country?

Employment and financial circumstances

- Are you working, or have you been offered employment in Australia?
- How much do you earn?
- If you are in Australia, do you pay tax?
- For how long do you anticipate working?
- Do you have private health insurance?
- Can your partner/family/sponsor provide care for you if you become ill?
- Are you/your partner/family/sponsor in a position to meet the cost of treatment, hospitalisation and care?

Family responsibilities

- Do you have a child/children?
- Do you have a child who is HIV positive?
- Is your child an Australian citizen or is the child's other parent a permanent resident?
- What will be the impact on your child if you are not granted permanent residence?
- Is your child dependent on you for financial support?
- Are you (or your partner) pregnant?

If you are applying on the basis of **marriage, or a de facto relationship**, it may also be useful to cover the following:

- What will be the impact on you, your spouse or partner, or your family, if you are not allowed to live in Australia?
- Would it be possible for your spouse/partner to live with you in your country, or some other country? If not, why not?
- Would denying you a permanent visa necessarily mean that you and your spouse/partner would be separated?
- Does your spouse/partner have other family obligations in Australia?
- What standard of health care, accommodation etc. would be available to your spouse/partner in your country?
- Is your spouse/partner also HIV positive?
- If your spouse/partner is not HIV positive, what steps have you taken to ensure that he/she does not become positive (e.g. safe sex)?
- If your spouse/partner is HIV positive, what treatments etc. will be available to him/her in your home country?
- How did your spouse/partner react to the disclosure that you were HIV positive?

You should give as much detail as possible about the questions which are relevant to you, and any other matter which you think should be taken into account. It is best to make a statutory declaration about these matters, and it may be useful to obtain

statutory declarations from people who are aware of your situation, such as your partner, family members and prominent members of your local community.

Appeals

If your application is rejected, you may have a right to apply for a review of the decision by the Migration Review Tribunal, or the Refugee Review Tribunal. In certain circumstances it may also be possible to seek a review by the Federal Magistrates Court of Australia and the Federal Court of Australia. You should get advice from a migration agent or lawyer. Legal aid may be available to assist with your appeal, depending on the circumstances.

For further information about appealing, see the Department of Immigration and Citizenship website: www.immi.gov.au

Getting help

If you or a member of your family is HIV positive and you have applied for Australian residence, or considering whether to do so, it is advisable to get legal assistance. The following organisations may be able to assist or put you in touch with a migration agent or lawyer with experience in this field.

Legal advice

HIV/AIDS Legal Centre (NSW)	www.halc.org.au
HIV/AIDS Legal Centre (VIC)	www.vicaids.asn.au/plc-legal-assistance
AIDS Action Council of the ACT	http://aidsaction.org.au/
Immigration Advice & Rights Centre (NSW)	www.iarc.asn.au/
Legal Aid	www.nla.aust.net.au (to locate your local service)

Referral

Legal Aid	www.nla.aust.net.au
Law Institute of Victoria	www.liv.asn.au
Law Society of New South Wales	www.lawsociety.com.au
Law Society of Northern Territory	lawsocietynt.asn.au/

Law Society of South Australia

www.lawsocietysa.asn.au/index.asp

Law Society of Tasmania

www.taslawsociety.asn.au

Law Society of the ACT

www.actlawsociety.asn.au

Law Society of Western Australia

www.lawsocietywa.asn.au

Queensland Law Society

www.qls.com.au

Migration Agents Registration Authority

www.themara.com.au

Please note: This factsheet contains general information only. It does not constitute legal advice. Immigration legislation, regulations and procedures change from time to time. You should check before you act on this information, and it would be advisable to contact a migration agent or legal centre if you need legal advice or assistance regarding your own or another person's situation.

This factsheet was updated in September 2011.