

# Right of Residence and Employment Law for Artists who are Third-Country Nationals

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## A. Right of Residence

*Niederlassungs- und Aufenthaltsgesetz* [Settlement and Residence Act] (NAG) regulates the granting, refusal as well as revocation and invalidity of residence permits for persons without Austrian nationality who reside or intend to reside in Austria for more than six months, as well as the documentation of the right of residence under EU law<sup>i</sup>. There are essentially three forms of residence permits:

- permits for a temporary stay of more than six months,
- residence title<sup>ii</sup> for a stay in Austria aimed at settlement, and
- documentation of the right of residence under EU law<sup>iii</sup>.

The *Fremdenpolizeigesetz* [Aliens' Police Act] (FPG) particularly regulates the issuance of visas<sup>iv</sup>, the enactment of measures for terminating residence and detention pending deportation.

The *Ausländerbeschäftigungsgesetz* [Act Governing the Employment of Foreign Nationals] (AuslBG) regulates, among other things, access to the labor market for artists from third countries who wish to be employed in Austria.

### I. *Niederlassungsbewilligung* for artists who are third-country nationals

#### 1. Basic Principles

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

- In principle, the first application must be submitted personally to an Austrian embassy or consulate. The jurisdiction depends on the place of residence in the country of origin. Applications are forwarded to the competent authority in Austria.
- The provided application forms must be used.
- The original and a copy of the documents must be submitted.

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

- The application for an extension must be filed with the locally competent *Aufenthaltsbehörde* [settlement and residence authority] in Austria (*Bezirkshauptmannschaft* or *Magistrat*).
- Please note: Extension applications must be submitted BEFORE the existing residence title expires!

### **1.3 General granting prerequisites**

- Proof of legal entitlement to customary local accommodation.
- Proof of a health insurance that covers all risks in Austria.
- Proof of sufficient financial means (all amounts valid for 2019): The stay may not lead to a financial burden for the local authorities. This is not the case if monthly means of subsistence of at least EUR €933.06 are available for a single person. For married couples, €1,398.97 per month is required. For a minor child, an additional €143.97 is required. No application for social welfare benefits may be made. Ongoing fixed costs (for rent, loans, garnishments, social security (SVA) contributions and alimony payments to persons not living in the same household but living in Austria) of more than €294.65 per month increase the necessary minimum income by the difference.

There are exceptions for students under the age of 24 (see 2.1.3).

- The stay must not conflict with public interests.
- The applicant may not have a permanent ban on entry or residence or an (enforceable) repatriation decision from another EEA state or Switzerland.

### **1.4 Important addresses, links and positions**

- Forms are available on the BMI website [www.bmi.gv.at](http://www.bmi.gv.at), in the section "Asylum and Migration/Settlement and Right of Residence" („*Asyl und Migration/Niederlassung und Aufenthaltsrecht*").
- A list of Austrian representation (embassies and consulates) can be found at [www.bmeia.gv.at](http://www.bmeia.gv.at).
- The *Magistratsabteilung 35* [Vienna Municipal Department 35] can be found at [www.wien.gv.at](http://www.wien.gv.at) in the section "virtual office/personal documents/stay" [*"Virtuelles Amt/persönliche Dokumente/Aufenthalt"*]. The address of the initial application department of MA 35 is: MA 35, 1200 Vienna, Dresdnerstraße 93 (Tel.: 4000-35261, E-mail: [11-ref@ma35.wien.gv.at](mailto:11-ref@ma35.wien.gv.at)).

## **2. Possible residence permits for artists who are third-country nationals**

### **2.1 Niederlassungsbewilligung [residence permit]**

#### **2.1.1 Basic information**

- Only for a stay of *more* than six months in Austria, entitles the holder to settle in the sense of NAG.
- The initial application must be made from another country. The extension is possible within Austria.
- The *Niederlassungsbewilligung* is tied to a specific purpose of stay.
- In principle, this purpose can be changed if the requirements for the new purpose of residence are fulfilled.
- With the *Niederlassungsbewilligung*, *permanent residence* ("*dauernder Aufenthalt*") and the *consolidation of residence* ("*Aufenthaltsverfestigung*") are possible. The *Aufenthaltsverfestigung* is relevant in the case of a return decision.
- The *Niederlassungsbewilligung* is initially issued for one year but can be issued for a period of three years after two years of continuous and lawful settlement in Austria and if Module 1 of the *Integrationsvereinbarung* [Integration Agreement] has been fulfilled.

### 2.1.2 Niederlassungsbewilligung für Künstler\_innen [Permanent residence for artists] according to §43a NAG

- The general granting requirements must be fulfilled.
- With the submission of an initial application, the applicant must prove knowledge of the German language at A1 level. The language diploma may not be older than one year at the time of application.

#### **PLEASE NOTE - THERE ARE SOME EXCEPTIONS!**

For example, proof of language proficiency at A1 level is deemed to have been rendered if Module 1 or 2 of the *Integrationsvereinbarung* [Integration Agreement] have been completed or count as having been completed (cf. §§ 9 and 10 IntG).

- A so-called *Haftungserklärung* [declaration of liability] is permissible in order to substitute the conditions concerning housing, alimony and health insurance. The *Haftungserklärung* is a declaration, certified by a court or notary in Austria, made by a third person, in which they agree to cover all costs associated with the stay in Austria, in particular for living costs (rent, food etc.), health insurance and any detention costs, etc. The *Haftungserklärung* is valid for 5 years and cannot be revoked. The person liable must prove his or her financial capability.
- In the case of employment, an approval of the regional office of the *Arbeitsmarktservice* [Austrian Public Employment Service] (AMS) in accordance with to § 20d Paragraph 1/6 AuslBG is necessary.
- In the case of self-employment, the activity must predominantly consist of artistic tasks. Living and incidental costs that must be met must be covered by the income obtained from the artistic activity.
- Family reunification is possible.
- In the case of employed artists, the employer can also file the application in Austria.
- After a continuous and lawful stay of at least five years, it is possible to change from *Niederlassungsbewilligung Künstler\_in* to the residence title *Daueraufenthalt – EU* [Permanent Residence – EU] (under the required conditions).
- The period of an immediately preceding legal residence in Austria on the basis of a *Niederlassungsbewilligung Künstler\_in* shall be credited in its entirety to the five-year period pursuant to § 45 paragraph 1 NAG for the residence title *Daueraufenthalt – EU*.

### 2.1.3 Aufenthaltsbewilligung für Studierende [Residence Permit for Students] (§ 64 NAG)

- The general grant requirements must be fulfilled.
- For single students up to the age of 24, a monthly sum of € 515.30 is sufficient in order to prove that they have a secure means of subsistence (valid for 2019). From the age of 24, a monthly sum of € 933.06 is required (valid for 2019).<sup>v</sup>
- A declaration of liability is permissible.
- It is not necessary to prove legal entitlement to customary local accommodation. However, the rental costs are of importance for the calculation of the necessary financial means.
- In the case of an initial application, a confirmation of admission from the university, the university

of applied sciences, the accredited private university or the public or private teacher training college or, in the case of an initial application in accordance with § 64 Paragraph 1 No. 7 NAG, written proof of the successful completion of studies in accordance with § 64 Paragraph 1 No. 2 NAG or proof of admission to a legally binding professional training must be submitted.

- In order to extend the permit, you must provide proof of successful studies in the previous academic year.
- Employment is possible as long as the study program is not affected as the sole purpose of residence and a permit has been granted under the AuslBG or the activity is excluded from the AuslBG.
- A quota-free changeover to a *Rot-Weiß-Rot-Karte* [Red-White-Red-Card] (cf. 2.2.2) after completion of studies is possible.
- Family reunification is possible.

## **2.2 Rot-Weiß-Rot-Karte**

### **2.2.1 Basic Information**

- For a limited residence in Austria, that is not only temporary.
  - The *Rot-Weiß-Rot-Karte* is also dependent on a specific purpose of residence.<sup>vi</sup>
  - A minimum number of points must be achieved. This depends mainly on education, professional experience, age and language skills. In the case of graduates, the points system does not apply.
  - The applicant must have a job commitment (doesn't apply for self-employed key personnel), which yields a certain minimum income: for people over 30 years of age, the amount is € 3,132 (2019) gross per month plus special payments. For those under 30, the amount is € 2,610 (2019) gross per month plus special payments. For graduates, it is at least € 2,349 (2019) plus special payments.
  - In the case of self-employed key personnel, the overall economic benefit of the employment, particularly with regard to the associated transfer of investment capital and/or the creation and safeguarding of jobs (at least in the region), must be proven.
  - In principle, the initial application must be submitted from abroad. However, there are exceptions, e.g. if there is another valid residence title (e.g. *Niederlassungsbewilligung*), during a lawful, visa-free stay or if there is a visa for the job search. The employer can also file the application in Austria.
- A changeover to the title "*Rot-Weiß-Rot-Karte Plus*" is possible if the person has been employed for at least 21 months within the last 24 months under the conditions relevant for the granting of the *Rot-Weiß-Rot Karte*.
- The unlimited right of residence (residence title *Daueraufenthalt - EU*) is possible after five years of continuous and lawful residence.
  - Family reunification is possible.

## **2.3 Niederlassungsbewilligung/ Rot-Weiß-Rot-Karte Plus**

- This may be considered following a *Rot-Weiß-Rot-Karte*, e.g..
- For a stay in Austria that is not merely temporary.
- The general granting conditions must be fulfilled.
- The *Rot-Weiß-Rot-Karte Plus* includes the right of unrestricted access to the labor market.
- Family reunification is possible.

## II. Necessary documents

### 1. What is necessary for each application?

- 1 passport photo;
- Valid passport (at least one year);
- Birth certificate (for the initial application);
- *Strafregisterauszug* [Criminal record extract] from the country of origin (for the initial application, no older than three months);
- If applicable: marriage certificate, partnership certificate, dissolution/divorce decree, certificate of adoption, death certificate, etc. of spouses or registered partners and children;
- Proof of legal entitlement to customary local accommodation (rental contract, sub-rental contract, residential right agreement, proof of ownership, etc.) (not necessary for students);
- Proof of (statutory or private) health insurance covering all risks in Austria, e.g. a policy. A travel health insurance is not sufficient!
- Proof of a secured livelihood, e.g. through pay slips, work contracts, binding contract commitments, proof of a claim to retirement, pension or other insurance benefits, income tax report, scholarship, preliminary employment contract, etc.
- Proof of savings, e.g. through account statements, savings book, *Kreditschutzverband* statement [credit protection association, oversees legal aspects of credit etc. obligations] (KSV) if necessary.
- A declaration of liability is also possible in combination with the *Niederlassungsbewilligung* for students and artists.

### 2. What is additionally required for a *Niederlassungsbewilligung Künstler in?*

- in the case of employment: a written notification from the AMS, which the *Aufenthaltsbehörde* obtains directly;
- in the case of self-employment: work contracts, written order commitments, etc.;
- advantageous: proof of artistic education (diploma, certificates) or description of previous artistic activity.
- language certificate level A1 or higher OR university diploma OR proof of university entrance qualification OR another certification according to §§ 9 and 10 *IntG*.

### 3. What is additionally required for a *Niederlassungsbewilligung Studierende?*

- In the case of an initial application, a confirmation of admission from the university, the university of applied sciences, the accredited private university or the public or private teacher training college or, in the case of an initial application in accordance with § 64 Paragraph 1 No. 7 NAG, written proof of the successful completion of studies in accordance with § 64 Paragraph 1 No. 2 NAG or proof of admission to a legally binding professional training must be submitted.
- In case of extension: Proof of successful studies, in particular *Studienerfolgsnachweis* [proof of academic success] in accordance with § 75 *Universitätsgesetz* [University Law] 2002.

#### 4. What is additionally required for a Rot-Weiß-Rot-Karte?

- Employer declaration (there is a form for this);
- Proof of a university degree or at least university entrance qualification, or a completed vocational training course or special knowledge or skills required for the proposed employment;
- Proof of German and, if necessary, English language skills;
- If applicable, proof of previous professional experience (employment certificates, recommendations, etc.);
- Depending on the purpose (key personnel, graduate, highly qualified person, skilled worker in a shortage occupation), additional evidence may be necessary.

## B. Employment Law

### 1. Employment

1.1 The employment of persons of non-Austrian nationality is regulated in the AuslBG. In principle, a *Beschäftigungsbewilligung* [employment permit] must be obtained from the AMS before the employment begins. However, there are exceptions: According to §1 Paragraph 2 lit. i) AuslBG, persons working in public and private institutions or companies, as well as their spouses and children, are excluded from the ambit of the AuslBG regarding their academic activities in research and teaching, in the creation and development of the arts as well as in art education. They do not require a license from the AMS. In addition, recognized refugees, people granted of subsidiary protection, EEA citizens and certain relatives of EEA citizens or Austrian citizens do not require a permit under the AuslBG.

Furthermore, there are permits, such as the *Rot-Weiß-Rot-Karte Plus* and the *Daueraufenthalt - EU*, which already contain the approval according to the AuslBG.

1.2 A "one-stop-shop" procedure is intended for employed artists from third countries: The issued *Niederlassungsbewilligung* also includes the right to work for a specific employer. Security certificate and employment permits are only intended for artists who are employed on a short-term basis.

The application for a *Niederlassungsbewilligung* as an employed artist must be submitted to the *Aufenthaltsbehörde*. They then forward the application to the AMS for the implementation of an approval procedure. After consulting with the regional advisory board, within 4 weeks, the AMS must confirm in writing to the authority that is responsible according to the NAG that the requirements for the approval as an artist according to § 14 have been fulfilled.

This means that the AMS itself assesses the artistic activity. However, neither a judgment of the value of the artistic activity nor of the artistic quality of the artist is permitted to be decisive. Furthermore, one must take into account that the refusal of the approval does not make a reasonable art practice impossible. If there are well-founded doubts, the third-country national(s) must make the intended practice of an artistic activity credible.

If the AMS comes to the conclusion that the conditions are not fulfilled, the application will be rejected. It is possible to lodge an appeal against the negative decision within 4 weeks of notification.

**PLEASE NOTE: The granted *Niederlassungsbewilligung* is tied to the activity with the employer named in the application. In the event of a change, a new approval procedure must be carried out:**

According to the legal opinion of the *Bundesministerium für Arbeit, Soziales und Konsumentenschutz* [Federal Ministry of Labor, Social Affairs and Consumer Protection] (BMASK), in the event of a change of employer, artists who are employed on the basis of a *Niederlassungsbewilligung - Künstler\_in* must apply for a new permit for employment with the new employer. The same applies if additional employment is sought. In the case of several permitted jobs, however, it will often not be possible to include all employers in the *Niederlassungsbewilligung*, due to a lack of space.

1.3 With the *Rot-Weiß-Rot-Karte*, particularly highly qualified persons, key personnel/graduates or skilled personnel in shortage occupations receive the right to exercise the activity only with a specific employer.

1.4 In principle, students may pursue a certain amount of employment (max. 20 hours per week without labor market examination) in addition to their studies. The employer must, however, be granted an employment permit by the AMS before the employment begins.

## 2. Self-Employed Activity

Self-employed persons do not require a permit under the *AuslBG*. If there are doubts as to whether they are self-employed, a *Feststellungsbescheid* [assessment notice] can be requested from the AMS.

## C. What else is there to consider?

### 1. What should one do if the application is not accepted by the authorities?

The authority is obliged to accept and process every application, even if the application appears hopeless from the outset. If it refuses to do so, the application should be sent to the authority by registered letter.

### 2. What should be done in the case of a notification of a *Hinterlegungsanzeige* [notice of official deposition] from the postal service?

The deposited letter must be collected as quickly as possible, as the deadline begins with the date of deposit. The deposited document must be kept ready for collection at the post office for at least two weeks, but the deadline begins on the day on which the document is first held ready for

collection. Deposited documents are therefore deemed to have been delivered on the first day of this period. Late collection may result in important deadlines being missed.

### **3. What should be done if the authority does not approve the application or issue the *Niederlassungsbewilligung* that was applied for?**

An appeal may be lodged against a negative decision. As a rule, the deadline for this is four weeks, but it is absolutely imperative that the time specified in the instructions on the legal appeal be observed. The deadline begins with the notification of the decision. If the notice is deposited, the deadline begins on the first day of the collection period (cf. 2.). There is no obligation to use a lawyer for a complaint, but it is recommended to obtain expert advice.

### **4. What should one do if the complaint has also been rejected?**

If the appeal is also rejected, it is possible to file an appeal to the *Verfassungsgerichtshof* [Constitutional Court] and/or an (exceptional) appeal to the *Verwaltungsgerichtshof* [Administrative Court] within six weeks of notification of the decision. If the decision was pronounced orally by the *Verwaltungsgerichtshof*, a written copy of the decision must be requested either immediately or within a period of two weeks after the delivery or notification of the transcript. Otherwise, neither a revision to the *Verwaltungsgerichtshof* nor an appeal to the *Verfassungsgerichtshof* may be filed.

The appeal and complaint to the *Verfassungsgerichtshof* must be made by a lawyer. If the financial means for the costs of legal representation are insufficient, legal aid can be applied for within the six-week period. Forms are available for download at [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) and Swiss nationals have the right of freedom of movement. They may therefore reside in Austria without a permit in principle, but since 1.1.2006, they have to register with the authorities for a stay of more than three months and then receive a registration certificate. The residence registration (*Meldezettel*) is sufficient for those who were already registered in Austria on January 1, 2006.
- ii *Rot-Weiß-Rot-Karte, Rot-Weiß-Rot-Karte plus, Blaue Karte EU, Niederlassungsbewilligung, Daueraufenthalt - EU, Familienangehöriger, Niederlassungsbewilligung - Künstler, Niederlassungsbewilligung – Sonderfälle unselbständiger Erwerbstätigkeit, Niederlassungsbewilligung – Forscher, Niederlassungsbewilligung-ausgenommen Erwerbstätigkeit, Niederlassungsbewilligung - Angehöriger.*
- iii Registration certificate, permanent residence certificate, residence card, permanent residence card. [*Anmeldebescheinigung, Bescheinigung des Daueraufenthalts, Aufenthaltskarte, Daueraufenthaltskarte.*]
- iv Visas are intended for a stay in Austria lasting less than six months.
- v § 9 Paragraph 4 IntG: (4) **Module 1 of the Integration Agreement is fulfilled** if the third-country national
1. submits proof from the Austrian Integration Fund (*Österreichischer Integrationsfonds*) that they have successfully passed the integration examination in accordance with § 11, (*Note: 2 canceled by Art. III Z 15, BGBl. I No. 41/2019*)
  3. has a school-leaving qualification which corresponds to the general university entrance qualification in the sense of § 64 (1) *Universitätsgesetz 2002*, BGBl. I Nr. 120/2002, or a vocational secondary school leaving qualification,
  4. holds a "*Rot-Weiß-Rot-Karte*" *Niederlassungsbewilligung* in accordance with section 41(1) or (2) of the NAG, or
  5. as holder of a residence title "*Niederlassungsbewilligung - Künstler\_in*" in accordance with § 43a NAG pursues an artistic activity in one of the artistic sectors listed under § 2 paragraph 1 subparagraphs 1 to 3 *Kunstförderungsgesetz* [Arts Promotion Law], BGBl. I No. 146/1988; in the event of doubts as to the existence of such an activity, a statement to this effect must be obtained from the competent Federal Minister.
- Module 2 (§ 10) is fulfilled if Module 1 is fulfilled.
- § 10 Paragraph 2 IntG: (2) **Module 2 of the Integration Agreement is fulfilled** if the third-country national
1. submits proof of successful completion of the integration examination in accordance with § 12 to the Austrian Integration Fund, (*Note: Z 2 canceled by Art. III Z 18, BGBl. I No. 41/2019*)
  3. is a minor and has attended a primary school as part of compulsory schooling, (§ 3 Paragraph 3 *Schulorganisationsgesetz* [School Organization Act] (SchOG), BGBl. No. 242/1962) or attended one in the preceding semester,
  4. is a minor and attends a secondary school (§ 3 Paragraph 4 SchOG) within the framework of general compulsory education and can prove the positive assessment in the subject "German" by the last issued end-of-year school report or other school report,
  5. can prove that they have attended a compulsory school in Austria for at least five years and have completed the subject "German" positively or have completed the subject "German" positively at the 9th school level or have demonstrated a positive assessment in the subject "German - Communication and Society" within the compulsory school-leaving examination in

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accordance with the *Pflichtschulabschluss-Prüfungs-Gesetz* [compulsory school-leaving examination law], BGBl. I No. 72/2012,  
6. has a positive degree in the subject "German" after at least four years of instruction in German at a foreign secondary school,  
7. has passed a final apprenticeship examination in accordance with the *Berufsausbildungsgesetz* [Vocational Training Act] BGBl. No. 142/1969, or a skilled worker examination in accordance with the *Land- und forstwirtschaftliche Berufsausbildungsgesetze* [Agricultural and forestry vocational training laws] of the federal states, or  
8. has been enrolled for at least two years at a post-secondary educational institution, has taken a course of study with German as the language of instruction and can prove that they have achieved at least 32 ECTS credits (16 semester hours) in the course of their studies or that they hold a corresponding post-secondary degree.

vi This is the *Ausgleichszulagenrichtsatz* [equalization supplement reference rate], which changes every year.

vii The amounts are also based on the reference rates for the compensatory allowance and change annually.

viii Especially highly qualified, other key employees, graduates, skilled workers in occupations with a shortage.