



## **AFAO Factsheet July 2004**

**AUSTRALIAN  
FEDERATION OF AIDS  
ORGANISATIONS INC.**  
ABN 91 708 310 631

PO Box 51  
Newtown NSW  
2042 AUSTRALIA

Ph +61 2 9557-9399  
Fax +61 2 9557-9867

Email [afao@afao.org.au](mailto:afao@afao.org.au)

Internet <http://www.afao.org.au/>

### **Applying for permanent residence in Australia Information for people with HIV/AIDS and their advisors**

The information in this Factsheet is correct as at July 2004. However immigration regulations and procedures change from time to time; therefore some of the information in this guide may have changed since it was written. You should check before you act on this information. AFAO cannot assume responsibility for errors in this guide or their consequences.

#### ***Immigration and HIV/AIDS***

The Australian immigration system has very strict health requirements for all people applying for permanent residence, designed to minimise costs to Australia's health care and welfare system. People are regularly excluded from migrating to Australia on a wide variety of health grounds.

Therefore all applicants are tested for HIV, and HIV status will be taken into account in deciding on your application for permanent residence. However there is no automatic exclusion on people with HIV/AIDS. A considerable number of people with HIV/AIDS have succeeded in obtaining permanent residence in Australia. It will depend on your individual circumstances. This article explains how the system works.

#### ***Classes***

To become a permanent resident in Australia, you must fall into one of the classes set out in the Migration Regulations eg. spouse, de facto spouse, interdependency, refugee etc. All classes have strict requirements that must be satisfied in every case, including health requirements.

#### ***Interdependency***

Over 80 percent of people living with HIV/AIDS in Australia are infected through homosexual sex. Therefore it is to be expected that a significant proportion of HIV positive applicants for permanent residence will be gay men in relationships with Australian citizens. (However there are also considerable numbers of HIV positive applicants who are not gay).

Gay relationships are recognised by Australian immigration law under the “interdependency” class, but only if one partner is an Australian citizen, permanent resident or eligible New Zealand citizen. This article does not deal with the requirements of interdependency. Any person proposing to apply on these grounds – whether HIV positive or not – is advised to obtain further information from the Gay and Lesbian Immigration Task Force (GLTF)(see contacts listed below).

### ***HIV Testing***

All applicants for permanent residence aged 15 years or over are required to have an HIV test. In addition, children under 15 are tested where they are to be adopted by an Australian resident, where they have a history of blood transfusions, or where it is clinically indicated.

The HIV test takes place as part of the process of medical examination undertaken by all applicants for permanent residence. People applying within Australia must see a Medical Officer for the Commonwealth. You will be advised of arrangements for HIV testing when you make the appointment for your medical examination.

### ***Health Requirements***

As a matter of practice, a positive test result will mean that you do not meet the strict health requirements. The health requirements apply to all classes of permanent residence, except for refugee applicants applying within Australia. Where other family members are included in your application (e.g. spouse and/or children) all members of the family unit must meet the health requirements.

### ***Waiver***

The health requirements may be waived in certain circumstances set out in the regulations. The Waiver is available for a very limited number of classes. For example the waiver is available for those applying under the following classes:

- spouse (including de facto spouse) of an Australian citizen or permanent resident;
- fiancé(e) of an Australian citizen or permanent resident;
- interdependency (which includes a gay or lesbian partner of an Australian citizen or permanent resident);
- dependent child of an Australian citizen or permanent resident;
- former citizen of Australia;
- “refugee” type applications.

The waiver is not available for other classes of applicants, including:

- Parents of Australian citizens/permanent residents;
- Preferential family and concessional family;
- Business skills.

Check with the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) to confirm whether the waiver is available for your class of application. If the waiver is not available for your class of application, it is legally impossible for your application to be approved.

If your application is in one of the classes that have access to the waiver, and you do not meet the health requirements, the DIMIA must then consider the question of whether to waive the health requirements. This is an integral and necessary part of the Department's decision-making process.

### ***How the Waiver works***

The health requirement can only be waived if you meet all the other criteria for grant of the visa or entry permit applied for.

Before waiving the health requirements, the DIMIA must be satisfied that the granting of the visa would be unlikely to result in:

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

The Department must also be assured that the granting of the visa would not represent a public health or safety risk. The Department of Health and Ageing has ascertained that access to HIV services is not of concern at present, so this part of the health waiver procedure does not present a problem.

### ***Undue cost***

The main issue for people with HIV/AIDS is whether there will be 'undue cost' to the Australian community. In each case, the DIMIA will obtain an estimate of the overall lifetime cost to Australian public funds of treatment, care, social security, housing etc. DIMIA is required to obtain the cost estimate from a Medical Officer for the Commonwealth within the Department of Health and Ageing. In the past this figure has been in the region of \$250,000. It is not open to DIMIA to dispute or review the cost estimate provided by the Medical Officer for the Commonwealth. The Migration Regulations require DIMIA to accept the opinion as to costs as correct.

It is then up to DIMIA to decide whether the cost is undue. In making this decision, DIMIA officers have been instructed that they should consider 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 and interdependency 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. Assessment of this criterion should not be rendered inaccurate by false analogy with an applicant's present circumstances. For instance, the fact that an applicant does not currently rely on such services may be due to non-availability, or to cost, or to the applicant's state of health now as distinct from what it will be likely to be in the future.
- 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 should you include?***

It is important that you include as much evidence as possible to enable the Department of Immigration to make an informed decision on the exercise of the waiver. The Department of Immigration will not necessarily ask you for this information; you need to include this material in your application.

It is suggested that the following questions should be addressed:

- 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?
- Were you infected in Australia?
- What evidence do you have of this?
- 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 documentation available?
- Have you personally experienced discrimination? (Specify)
- Is treatment readily available in your home country?
- What support mechanisms do you have in your home country?
- Does your family know that you are HIV positive?
- If you are gay, what is the situation for gays in your home country?
- 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?
- Will you become dependent on Australian Social Security?
- Do you have a child/children?
- Is your child HIV positive?
- Is your child an Australian citizen?
- 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, de facto relationship, interdependency, also address:

- 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 partner to live with you in your country, or some other country?
- If not, why not?
- Would this necessarily mean a forcible separation of you and your partner?
- What would be the impact on your partner if they were required to live in your country? Can they speak the language?
- Could your partner work in your home country?
- Does your partner have other family obligations in Australia?
- What standard of health care, accommodation etc. would be available to your partner in your country?
- Is your partner also HIV positive?
- If your 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 partner is HIV positive, what treatments etc. will be available to him/her in your home country?
- How did your partner react to the disclosure that you were HIV positive?

You should give as much detail as possible about all these questions which are relevant to you, and any other matter which you think should be taken into account in your favour. You should make a statutory declaration about these matters, and statutory declarations should be obtained from your partner and other relevant family members.

### ***Appeals***

If your application is rejected, you may have a right to apply for a review of the decision by the Migration Internal Review Office, or the Migration Review Tribunal. In certain circumstances it may also be possible to seek a review by 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.

### ***Getting help***

It is probably important that you get assistance in preparing your application and compiling the necessary evidence to maximise the chance of success. The following organisations may be able to assist or to put you in touch with a migration agent or lawyer with experience in this field.

HIV/AIDS Legal Centre (NSW) (02) 9206 2060 <http://www.halc.org.au>  
 Gay and Lesbian Immigration Task Force (GLITF) Offices:  
 GLITF NSW (02) 9283 4031 <http://www.glitf.org.au/>  
 GLITF Qld (07) 3367 0731 <http://www.glitf.powerup.com.au/>  
 GLITF Victoria (03) 9523 7864 E-mail: [glitfvic@hotmail.com](mailto:glitfvic@hotmail.com)  
 Department of Immigration, Multicultural and Indigenous Affairs <http://www.immi.gov.au/>  
 Migration Agents Registration Authority <http://www.themara.com.au/>