

# POSITIVE MIGRATION GUIDE

Immigration for HIV positive people,  
their family members and others who  
fail the health criteria

halc

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LAW AND JUSTICE  
FOUNDATION

OF NEW  
SOUTH WALES

This Immigration booklet contains the relevant law in the Commonwealth of Australia on immigration law. The law is applicable to applying for migration to Australia as at 1 December 2011.

This document has been prepared by the HIV/AIDS Legal Centre (HALC) ABN 39 045 530 926.

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# IMMIGRATION FOR HIV POSITIVE PEOPLE, THEIR FAMILY MEMBERS AND OTHERS WHO FAIL THE HEALTH CRITERIA

All Australian visas are subject to health criteria. Some temporary and all permanent visa applicants must undergo health checks to determine whether they satisfy the health criteria. The health check may include an HIV test. All permanent visa applicants over 15 years of age must undergo an HIV test with Medibank Health Solutions, if in Australia; or a Panel Doctor, if outside Australia. Some applicants under 15 years may also have to undergo an HIV test, for example, where there is a reason to test such as a child with HIV positive parents or where the child is adopted. A list of what health checks are usually required and in what circumstance is located at Annexure 1.

The Department of Immigration and Citizenship (DIAC) can refuse to grant a visa if the applicant refuses to undergo the health assessments. DIAC can also refuse to grant a visa to an applicant who refuses to sign a Health Undertaking (form 815) that they will attend further medical examinations once in Australia or once the visa is granted, if required.

Due to the health criteria, people living with HIV (PLHIV) cannot always obtain visas to visit or live in Australia.

This guide will cover:

- Background on the Health Criteria
- Temporary Visas and the Health Criteria
- Obtaining Medical Treatment in Australia
- Permanent Visas and the Health Criteria
- What the Health Waiver is and How it Works
- Protection/Refugee Visas and the Health Criteria
- Carer Visas

Immigration pathways very often involve strategic choices. Whilst this guide can give you an outline of the considerations and processes involved in obtaining a health waiver, it cannot be a substitute for migration advice tailored to your circumstances, migration history and needs. We recommend that you seek the advice of a registered migration agent/solicitor, with whom you feel comfortable disclosing your HIV status, before making your migration application.

This guide is directed to people with HIV seeking to travel to Australia. It will also be useful to anyone who seeks to come to Australia and who fails the health criteria on the grounds of posing a significant cost to Australia.

## BACKGROUND ON THE HEALTH CRITERIA

For many years migration law in Australia has been discriminatory towards people with disabilities, including people living with HIV. However, following the Australian government's ratification of the Convention on the Rights of People with Disabilities in 2008, the Federal Parliament Joint Standing Committee on Migration reviewed migration laws with respect to their health criteria and made some promising amendments. There have been significant changes for people with HIV in obtaining temporary visas and a few changes in obtaining permanent visas.

It is hoped that the Federal government's immigration policies will be reformed to remove discrimination and better comply with Australia's undertakings and obligations to people with disabilities. However, until this occurs there remain only limited pathways for people with HIV to migrate to Australia.

### THE HEALTH CRITERIA

Applicants are assessed against three main health criteria which are set out in Schedules 4005, 4006A and 4007. All applicants are assessed against the following factors:

1. whether they are a threat to public health or a danger to the community;
2. whether they have a condition that would prejudice access to health care or community services;
3. whether their condition would be likely to pose a significant cost to the Australian Community .

Whilst the first two factors are not relevant to PLHIV, the third one is.

The health criteria are applied to all applicants with the exception of:

- persons in need of medical treatment applying for Medical Treatment Visas and
- applicants for Protection Visas (on-shore refugees)

In these cases, an altered health criteria test is applied.

The health criteria are also applied to non-migrating dependents of applicants for permanent visas (excluding humanitarian visas).

HIV is not considered to be a disease or condition that is a threat to public health, nor, in our experience, would a PLHIV be deemed to prejudice access to health care or community services. However, all permanent applicants, and the majority of temporary applicants, who test positive for HIV will be deemed to be a "significant cost to the Australian Community in terms of health care and community services" (s (1) (c) (ii) (A) Sch4005/4006A/4007 Migration Regulations 1994 (Cth)).

All applicants (and their dependents included on their application, and in the case of applicants for permanent visas, even dependents who are not migrating) are assessed against the health criteria by the Medical Officer of the Commonwealth (MOC). The assessment determines whether the applicant (or dependent) is likely to be a *significant cost* to the Commonwealth in terms of healthcare or community services. The MOC provides a dollar value costing for the estimated medical expenses of the applicant. The MOC will also indicate if the condition is likely to prejudice access to health care or community services. Everyone with HIV will fail the health criteria for permanent visas (or for temporary visas that lead to a permanent visa) due to the cost.

Only some visas allow for a waiver of (or exemption from) the health criteria. For those visas with a health waiver, the decision is made by balancing the estimated *significant cost* of medical needs versus all other factors in favour of granting the visa. This involves a determination as to whether or not the significant cost is undue or excessive.

## TEMPORARY VISAS AND THE HEALTH CRITERIA

### Can I come to Australia temporarily if I am HIV positive?

**Yes, in most circumstances you can come to Australia temporarily. Your HIV status will not affect your ability to visit Australia for a short visit (of less than 3 months). In some circumstances, such as longer stay temporary visas, your HIV status may affect your visa application.**

For temporary visa applicants the estimated cost due to a person's HIV condition will most likely not be a consideration. This is because you will be unlikely to pose a *significant cost* during a short visit. This means that there are only very limited circumstances in which, because of health, an HIV positive person will not be able to obtain a temporary visa for entry to Australia.

For temporary visa applicants the following factors are **not included** in determining whether they are likely to incur significant costs to the Commonwealth:

- (a) Social Security (Centrelink) payments (including Child Benefits, Child Disability Allowances, Disability Support Pensions, Double Orphan Payments, Family Tax Benefits, Education Entry Payments, Maternity Allowances, Maternity Immunisation Allowances, Mobility Allowances, Pharmaceutical Allowances, Sickness Allowances and Special Benefits);
- (b) Costs associated with issuing a Health Care Card or Pensioner Concession Card;
- (c) Pharmaceuticals listed under the Pharmaceuticals Benefits Scheme (PBS) that, if ceased, would not be seriously detrimental to the applicant's life or wellbeing.

The rationale behind this is that, since applicants for temporary visas are ineligible for Medicare, they cannot therefore accrue costs in terms of health care. It has been recognised that it *'would not seem fair or reasonable, for example, to refuse to grant a temporary visa to an applicant with a disability, or an elderly applicant, on the basis of services that they would not be eligible for when in Australia (due to the type of visa they are applying for and would hold if granted).'*<sup>1</sup>

PLHIV not on anti-retroviral medication and who are unlikely to require medication whilst in Australia will meet the health criteria as they will not be likely to incur significant costs. However PLHIV on anti-retroviral medication may be considered a significant cost under subsection (c) above. This will depend on a calculation of the medication they require, its cost and the intended length of stay.

Because of the complications that may arise in these temporary visa applications, it is important that you have disclosed your HIV status to your migration agent/solicitor so that they are able to advise you accordingly. It is recommended that you seek migration advice early on to ensure that you do not make a migration decision that may negatively impact upon your ability to make future applications. This is particularly relevant if you are considering pathways to permanent migration to Australia.

<sup>1</sup>Explanatory Statement to the *Migration Legislation Amendment Regulations 2011* (No.1) (Cth)

## What if I fail the health criteria because they decide that I am likely to incur significant costs?

If you fail the health criteria because of the estimated cost you will be given what is called a 'natural justice letter' notifying you of the intention to refuse the visa because of health and giving you an opportunity to respond. In order to respond to a 'natural justice' letter for a temporary visa you should make arguments demonstrating why you will not pose a significant cost the Commonwealth.

There are numerous ways to show that you are not likely to incur significant costs. PLHIV applicants can bring their own medication, or explain how they are obtaining them at no cost to the Commonwealth in order to meet the health criteria requirement. Reducing the length of your proposed stay may also allow you to satisfy the health criteria. Alternatively, you may consider making multiple short applications consecutively. If you do so you must ensure you make each subsequent application prior to expiration of your visa. The two main types of temporary visa where the potential cost is always a consideration are those temporary visas which lead to the grant of a permanent visa; and those which enable the visa holder to remain in Australia indefinitely. The first group includes parent, partner, child, and carer visas; whilst the second covers a select group of skilled visas where the applicant will (most likely) be remaining permanently in Australia if the visa is granted. For a complete list, see the Gazette notice IMM111/032 located at **Annexure 2**.

## Can I get a temporary visa to work in Australia if I am HIV positive?

**Yes, you can apply for a temporary work visa. The main type of temporary work visa is the 457 - Temporary Business (longstay) visa. It requires nomination by an approved employer. If you do not meet the health criteria, you have the opportunity to have the health criteria waived.**

The 457 visa allows the applicant to stay and work in Australia for the sponsoring employer for anywhere between three months to four years. The applicant specifies the length of stay in the application form. The same process applies whether the applicant applies onshore or offshore.

Applications for visas can be made either in Australia (*onshore*) or overseas (*offshore*). Different rights (particularly appeal rights) attach to applicants depending on where applications are made.

## APPLICABLE HEALTH CRITERIA – 4006A

HIV positive applicants will generally be assessed as a *significant cost* by the MOC for this visa as they will be applying for a stay of up to 4 years. However, as described above in the section on general temporary visa applications, HIV positive applicants who are not on treatment (and not anticipated to be on treatment for the duration of the visa) should receive lower costings or even meet the health criteria, particularly for shorter term 457 visas.

Thus, the length of the visa is an important consideration and for many applicants a visa term of 3 years is the best strategic option. We recommend obtaining advice about your particular circumstances when deciding the term of your 457 visa.

Once the MOC has issued the health report and costing, DIAC will provide this to the applicant. It is at this stage that the 4006A criteria differ from the other health criteria in that 4006A allows a “waiver” where an applicant can obtain from their employer an *undertaking* (effectively a guarantee) that the employer will indemnify the Australian government for any costs it incurs that are associated with the applicant’s health condition.

DIAC will give the applicant the opportunity to approach their employer and request such an undertaking. There is no legal obligation on the applicant to disclose the exact details of their medical condition to their employer. In practice, however, employers more often than not require the details of the condition and are unwilling to issue undertakings without such knowledge. We have had only one case where the employer was willing to make the undertaking without knowing details of the applicant’s medical condition.

The health undertaking given by the employer must be in a specific form. In all cases, the undertaking is that the employer will pay for any health care or medical costs relating to the condition identified by the MOC. The undertaking must also include the MOC cost estimate. The undertaking is not, however, limited to the amount of the cost estimate but must cover any and all costs incurred in relation to the named applicant and the identified condition. Equally, where no costs are incurred, the employer will not be required to pay anything.

457 visas now contain a condition that the applicant and their dependents must be covered by private health insurance during the term of the visa. The applicant having private health insurance does not exempt the employer from making the undertaking.

DIAC is not compelled to grant the waiver even where an undertaking is obtained, as DIAC must satisfy itself that the employer is capable of honouring the undertaking. In most cases, however, the visa will be granted where an undertaking is obtained. The current version of the specific words for the undertaking is provided as **Annexure 3**.

## **Can I come to Australia to obtain medical treatment if I am HIV positive?**

### **Can I come to Australia to obtain medical treatment if I am HIV positive?**

**Yes, you can come to Australia to obtain medical treatment, however in most circumstances you will have to cover all medical costs yourself.**

**A Medical Treatment visa is usually a visa for a person seeking to enter or remain in Australia for medical treatment (including donation of an organ). It is also available to someone who wishes to accompany the person seeking treatment in order to provide them with emotional and/or physical support. This visa is either subclass 675 (short stay visa for up to 3 months) or subclass 685 (long stay visa for a period specified by the Minister, of up to 12 months).**

For applicants in need of medical treatment, the only health criterion that applies is that the person does not have a *disease or condition that is a threat to public health* (eg tuberculosis). In practice, this often means that applicants will have to undergo a chest x-ray, particularly if they are from a high risk country. HIV has never been considered a *threat to public health* under the *Migration Act* in Australia. For a medical treatment visa, a person's HIV status will be irrelevant to the visa application process.

In the case of an emergency medical treatment visa, DIAC may decide to waive the requirement to have a chest x-ray (eg pregnant visa applicants seeking to give birth in Australia to avoid the risk of vertical transmission), and instead ask that the applicant sign an undertaking to notify their treating doctor in Australia that they have not been tested for tuberculosis.

When people apply as a support person, their HIV status will not be a consideration.

If you are applying for medical treatment in Australia, you need to demonstrate adequate funds to obtain the treatment unless you are a citizen of Papua New Guinea residing in the Western Highlands Province and have been approved by the Queensland Department of Health for medical evacuation to a hospital in Queensland; or you are over 50 and have been refused a permanent visa having satisfied all criteria with the exception of the health criteria. You will not be covered by Medicare for the duration of your stay.

## Can I come to live permanently in Australia if I am HIV positive?

**Possibly. Depending upon what type of visa you apply for and where you are located, the health criteria may be able to be waived. Waivers can be sought for a selection of family, skilled and humanitarian type visas.**

There are only limited circumstances in which PLHIV can obtain a permanent visa for Australia. These limited circumstances are where the 4007 health criteria apply to allow the applicant to request a waiver of the health criteria by demonstrating that the estimated cost, whilst significant, is not undue. This is done by showing that compelling and compassionate circumstances exist which warrant a waiver of the health criteria.

PLHIV who apply for any permanent visa that is subject to the 4005 health criteria will have their visa refused.

### CONDITION 8503 'NO FURTHER STAY'

Conditions such as limitations on work or length of study, may be attached to temporary visas. One such condition is 'condition 8503 –no further stay'. With this condition on the visa the applicant cannot make a further migration application onshore, unless the condition is waived. Waiver of an 8503 condition is discretionary and difficult to obtain. It may be waived only on compelling and compassionate grounds which are beyond the control of the applicant and have arisen after the grant of the last visa held. Some temporary visas do not allow for an 8503 condition to be attached to the visa. For example, business (long stay) - visa subclass 457 and student visas do not attract condition 8503.

A request for a waiver of condition 8503 must be in writing and include all information in support of the request. The decision to grant a waiver is discretionary and unless new circumstances have arisen a request can only be made once. The decision is not reviewable.

If an applicant has sought a waiver of the condition 8503, this does not give the applicant the right to remain in Australia until a decision has been made. Accordingly, should the substantive visa expire before a decision is made, the applicant will become an 'unlawful non-citizen' unless a Bridging Visa E is obtained on 'departure grounds'. This may have negative implications for the applicant and can limit their ability to apply for a subsequent visa even if the condition is removed.

Note that the only visa application that can be lodged when the applicant currently holds a visa with a condition 8503 is an application for an *onshore protection* visa.

## How Does the Health Waiver Work?

Generally, only after the primary criteria have been satisfied will DIAC look to the health criteria. Once you have attended the medical examination, the MOC will assess you against the relevant health criteria; this will include assessing the cost of your condition. The MOC provides DIAC with an estimate dollar figure cost for the health and community services they believe you are likely to use while in Australia. The MOC may ask you to supply information, including viral load and CD4 count, from your treating specialist in order to assist with making an estimate.

DIAC then sends the applicant a *natural justice letter*. This includes the costing and opinion from the MOC and asks the applicant to provide a response. This letter is sent to all applicants who fail the health criteria, whether or not there is a health waiver available for the visa. If a waiver is available, DIAC will notify the applicant of this in the *natural justice letter*. If there is no waiver available, DIAC will still ask for a response, although an HIV positive applicant will be unable to provide a response that will result in a visa grant.

The *natural justice letter* will specify a date by which the response must be received by the department. Onshore applicants are given 28 days to respond. Offshore applicants are usually given longer.

## What Factors are Considered for a Health Waiver?

The *natural justice letter* may indicate a list of issues the applicant may wish to cover in the response. The basic test is whether the *significant cost* to the community that the applicant represents is *undue in all the circumstances*. Details of the factors DIAC takes into consideration are included at the end of this guide as **Annexure 4**.

The factors broadly are:

- The benefits the applicant and/or sponsor bring to the Australian community and the economy;
- The applicant and/or sponsor's ability to offset the potential cost;
- The disadvantages visa refusal would bring to the applicant and/or sponsor, the Australian community and economy;
- Any relevant humanitarian considerations.

For PLHIV, the MOC will determine that the cost of health care and community services will be a *significant cost*. The question then becomes whether the cost to the Australian community will be an *undue cost*.

Consideration of whether or not the cost is an *undue cost* requires the balancing of a defined monetary cost against the intangible emotional and social considerations that are compelling and compassionate factors.<sup>2</sup>

Any circumstances relevant to the applicant or sponsor that bear on either the benefit of the grant of the visa, or on disadvantages to the applicant should the visa not be granted will be relevant considerations to the health waiver. Such benefits or disadvantages must be explained in detail and evidenced as far as possible. There is no limit to the factors DIAC can take into account when assessing the health waiver.

### **Economic Considerations**

The job skills of the applicant and the sponsor will be relevant. Skills or qualifications indicated as critical skills or 'in demand', either by DIAC or by applicant's or sponsor's State/Territory government, will considerably enhance the likelihood of a successful application. Employment history, earnings history and capacity, and savings records which are evidenced will be of advantage. Aspirations for further study will also be taken into consideration.

### **Social Considerations**

Evidence that granting the visa will benefit the sponsor or their family will carry weight, particularly where it can be shown to relieve the government of the burden of care for elderly or disabled family members. For example, an Australian sponsor might provide considerable assistance to his or her elderly parents. If this person's partner's visa was not granted, he or she intends to move overseas to live in the partner's country of origin, thus increasing the level of assistance that his or her parents would require from government services. Evidence of broader social links and familial links are of benefit, showing a level of integration and involvement in the community. While the waiver will not be granted on the strength of the applicant/sponsor relationship alone, the strength of that relationship will bear considerable weight.

### **Humanitarian and Compassionate Considerations**

Where there would be considerable jeopardy to the applicant and/or the sponsor from returning to the country of origin of the applicant, the dangers need to be evidenced and made clear. This disadvantage to the applicant and/or sponsor carries considerable weight. Humanitarian and compassionate concerns may include access to treatment and healthcare for applicant and/or sponsor, human rights considerations in the country of origin, and stigma and discrimination issues that may arise in the country of origin.

A current list of all visas with a health waiver, or where health is not a bar is **Annexure 5** at the end of this factsheet.

<sup>2</sup> *Bui v Minister for Immigration & Multicultural Affairs* [1999] FCA 118

**What do I need to consider if I am HIV positive and applying for a permanent visa on the basis of my skills?**

**You will only be able to obtain a visa which allows a health waiver. You will need to consider whether your circumstances will assist you in getting a health waiver.**

## **APPLICABLE HEALTH CRITERIA - 4007**

There are only a limited number of skilled visa options available to people who will fail the health criteria. All of these are onshore visas (made by applicants eligible to lodge the application in Australia), require sponsorship and require the applicant to hold a qualifying visa. The most common of these visas are:

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### **Visa Subclass 856**

#### **– Employer Nomination Scheme**

Applicants who are sponsored by a company/organisation for a position on the relevant skills list.

The employer must be willing to employ them for a minimum of 3 years fulltime work.

Certain other criteria such as wage levels, English fluency, age must be satisfied.

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### **Visa Subclass 846**

#### **- State/Territory Sponsored Regional Established Business in Australia**

Applicants who own, or part own, a successful business in a regional area and are sponsored by a relevant state/territory government organisation.

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### **Visa Subclass 855**

#### **– Labour Agreement**

Applicants who are sponsored by a company/organisation that is party to a Labour Agreement (eg a meatworks).

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### **Visa Subclass 857**

#### **– Regional Sponsored Migration Scheme**

Applicants who live rurally or regionally and have a sponsoring employer. This visa has less stringent sponsorship criteria. To be eligible, applicants must be offered a minimum of two years full time employment in a position that requires at least an Australian equivalent trade certificate, diploma or higher qualification.

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These visas all allow for a waiver of health criteria in certain circumstances. One of these is that the applicant must reside in a *participating State or Territory*. Currently, all States and Territories are participating but this will need to be confirmed at time of application.

Unlike the 457 visa there is no requirement that the employer provide a health undertaking for any of these visas. The applicant will be invited by DIAC to provide submissions and supporting material. However, the health waiver considerations only involve the applicant and DIAC. The employer is never advised by DIAC of any medical issues, although the health waiver does slow the process of visa grant and this delay in processing may cause the employer to ask questions.

## APPLICATION OF THE HEALTH CRITERIA

As explained earlier in 'What Factors are Considered for a Health Waiver?' Schedule 4007 allows for a waiver where the applicant can show that his or her costing is not an *undue* cost to the Australian community.

The waiver process for this visa places a heavy emphasis upon the state's opinion as to whether or not a waiver should be granted. Each state/territory has different criteria that they apply when assessing whether or not they will support the grant of a waiver. In certain circumstances, some states/territories have indicated that they will support a waiver automatically, without their opinion being sought. Even if the state/territory does not support it, DIAC may still grant the waiver.

Other areas of consideration are:

- The applicant's English fluency, skills and experience; and that of any dependent applicants;
- Whether there is a shortage of the applicant's skills in the sponsor's geographical area;
- The applicant's intended place of residence (urban, rural or regional);
- The prospective income level of the applicant, and any dependent applicants;
- The employer's difficulties in filling the position;
- Any views of the participating State or Territory Government;
- The applicant's current health and prognosis (especially as relating to fitness to work);
- The level of specialist care necessary;
- Any insurance, assets or other investments that the applicant can draw upon in case of need;

- Family and other support networks of the applicant, and his or her integration into the Australian community;
- Effect on any Australian citizens of refusal of the visa application (particularly if they are immediate family members);
- The applicant's immigration history;
- Humanitarian considerations (health infrastructure, social stigma etc.) in the applicant's home country;
- The ability or otherwise of the applicant to relocate to a third country where they would not suffer risk of harm.

There is no rule as to what format the submissions should take, although for skilled visas a pro forma will be supplied by DIAC. This, however, should only be taken as a guide as there may be a wide range of case-specific considerations that should be addressed. DIAC has indicated that it is preferable that applicants supply all documentation that they wish to be taken into consideration, even if that information has been supplied previously. Since the decision is discretionary, any steps taken to assist the decision maker can only be beneficial.

It is important to supply as much independent evidence as possible to substantiate your claims. Submissions should be made in writing, and although applicants can make these submissions unassisted, we recommend that an experienced migration agent solicitor is engaged, at least in the health waiver part of the process. Details of the factors DIAC takes into account in skilled visa health waivers are included in **Annexure 4**.

#### **MIGRATION AGENTS/SOLICITORS ENGAGED BY EMPLOYERS**

Many employers engage their own migration agents when sponsoring employees; and the employee will have access to this same migration agent. While agents are formally bound not to pass information such as a person's HIV status or the fact that they are seeking a health waiver onto the employer, such disclosures may well happen. Applicants need to consider this when engaging with an employer's migration agent and consider whether or not they wish to obtain their own migration agent early in the process (rather than upon receiving the health waiver letter).

There is a small selection of other options for HIV positive skilled migrants, however the qualifying visas for the other options do not have a waiver available and therefore it is not likely that a person with HIV would be on such a qualifying visa unless diagnosed subsequently to applying for their previous visa.

## I want to move to Australia to live with my Australian partner. If I am HIV positive, can I get a Partnership Visa?

**Yes. Partnership Visas have a health waiver available. Partnership visas include Spouse, De facto Partner and Prospective Marriage/Fiancé visas. You will need to consider whether your circumstances will assist you in getting a health waiver.**

### Applicable Health Criteria: 4007

The partnership visa application allows the spouses, de facto partners or prospective spouses of Australian citizens, permanent residents and *eligible* New Zealand citizens to obtain a permanent visa to reside in the country.

1. The *Spouse* category requires the sponsoring partner and applicant to be married.
2. The *De facto* category is for couples who have either been living together for a minimum period of 12 months immediately prior to the application, **or** who have registered their relationship on a State or Territory *Relationships Register*.
3. The *Prospective Spouse Visa* requires demonstration that the relationship is a genuine relationship, and that the couple will marry in Australia no later than 6 months after grant of the visa.

The partner visa can be applied for by homosexual or heterosexual couples in de facto relationships but only heterosexual couples can apply for the spouse or prospective spouse visa. Overseas same sex relationship recognition is not valid in Australia for migration purposes. Same sex partners have to apply in the de facto category and, unless their relationship is registered in an Australian state or territory, must meet the 12 month cohabitation requirement.

The **Relationships Register** is not available in every state and territory in Australia. You should contact the equivalent of the Department of Births, Deaths and Marriages in the state or territory in which you reside.

**Eligible New Zealand citizens** are those citizens who entered Australia prior to 26 February 2001. These sponsors will also have to satisfy the same health criteria as that applied to the applicant. Spouses or partners of New Zealand citizens who entered Australia after that date are limited to applying for a temporary visa – the New Zealand Family Relationship visa - Subclass 461. This visa has the same health waiver process as the permanent partner visa. Although the visa is temporary, it can be renewed every 5 years provided that the relationship continues. Other dependents can also be sponsored under this visa category by their New Zealand family member.

## Application of the Health Criteria

The same 4007 health criteria apply as for the Employer Nominated Scheme (856) visa described above. DIAC similarly performs a balancing exercise between the estimated monetary cost of the applicant and their potential contribution to the Australian community.

The primary difference between the 856 health waiver and the partner health waiver is that whilst the former focuses on the economic skills of the applicant, the latter focuses on the impact on the Australian sponsor of a refusal of the health waiver. There is little actual difference between the waivers; and economic skills, relationships with an Australian partner or other positive factors will receive the same weight under either health waiver process.

Therefore, all the factors listed under the 856 health waiver process are relevant to a partner visa application. Due to the specific nature of a partner visa application, however, the ability of the sponsor to relocate to the applicant's home country becomes an additional (and heavily weighted) factor for DIAC to take into account. When assessing the sponsor's ability to relocate, DIAC will consider:

- the sponsor's language skills, where the applicant comes from a non-English speaking country;
- the transferability or otherwise of the sponsor's employment skills;
- any family or other supports that the sponsor has in the applicant's home country;
- the sponsor's ties to Australia (children, elderly family members, parents, siblings etc);
- any risk of harm to the sponsor (for instance, as result of poor medical treatment available where the sponsor is also HIV-positive);
- permanent visa options for the applicant and sponsor in the applicant's home country.

The following additional factors are also of relevance:

- the strength and duration of the applicant and sponsor's relationship;
- whether there are any children of the relationship, and if so:
  - their ages, location and circumstances;
  - whether they are Australian citizens.

Where either an applicant or a sponsor has the right to enter a third country (for instance, where the applicant possesses dual citizenship), DIAC will consider all of the relocation criteria for both applicant and sponsor.

## Are there other categories of family visa that I can obtain, if I am HIV positive?

**Yes. Any of the visas with a 4007 health criteria can potentially be obtained by an HIV positive person.**

### **Applicable Health Criteria: 4007**

The family category visas that have 4007 health criteria are assessed in a similar way to that of the partnership category visas and, in the case of child visa categories, look heavily at the humanitarian compelling and compassionate factors in support of the waiver.

A full list of these visas can be found included in **Annexure 5**.

## **I am HIV positive. Can I seek protection or asylum in Australia due to persecution in my country of origin?**

**Yes, you can seek protection in Australia. However, depending upon what type of humanitarian visa you apply for and where you are located, the health criteria may or may not impact upon you.**

### **Applying in Australia**

**HIV or other medical conditions are irrelevant in an onshore protection application. Such medical conditions can only be taken into account as a reason to grant the visa.**

**It is possible for an applicant to seek protection from their country of origin on the basis of persecution as a result of being a member of the particular social group of *people with HIV/AIDS*.**

**Applicants who test HIV positive will usually be required to sign a Health Undertaking (Form 815). The visa will be refused if this is not signed and returned upon request.**

### **Applying from outside Australia as a Refugee or an Applicant Sponsored by Family/Friends or an Organisation in Australia**

**Offshore humanitarian visa applicants are subject to the 4007 health criteria. These are the same as those of the Partnership and 856 visas described above, however, there are additional considerations.**

## Application of the Health Criteria

As all applicants for humanitarian visas have compassionate and compelling reasons that go towards granting the visa, the following additional factors are taken into consideration:

- the applicant's family links to Australia; and whether refusing the visa would lead to separation of immediate family;
- the whereabouts of any close family members not included in their application;
- whether the case has been referred by the UNHCR;
- whether the applicant is in a particularly vulnerable situation (eg 'woman at risk', or torture or trauma survivor); and
- the applicant's proposed care and/or support in Australia.

While DIAC does accept that humanitarian applicants are unlikely to be able to personally mitigate potential costs, consideration is also given to:

- the applicant's English language skills, educational background and any skills and qualifications; and
- the applicant's employment history.

### **I am HIV positive and have no support or assistance in Australia. Can I sponsor a family member to migrate to Australia to care for me?**

**Yes, if you are so unwell that you require care and support, and there is no other person or organisation in Australia that can offer you this assistance, then your relative may come to Australia to help.**

A close relative (a spouse, child, parent, brother, sister, grandparent, grandchild, aunt, uncle, niece or nephew, including step equivalents of these relationships) of an Australian resident may be sponsored to migrate to Australia and offer care to their relative.

The Australian resident relative must demonstrate that they have a medical condition that is causing physical, intellectual or sensory impairment of their ability to attend to the practical aspects of daily life.

An assessment of the person in need of care by Medibank Health Solutions must be performed. This can be done either 'on the papers' (based solely on medical reports by treating doctors) or by medical examination conducted by Medibank Health Solutions.

Medibank Health Solutions will issue a carer certificate if they find that the impairment has, under the Impairment Tables used by Centrelink to determine eligibility for payment of the Disability Support Pension, a rating that is equal to or exceeding 30 points. It must be demonstrated that, because of the medical condition, the person has, and will continue for at least two years to have, a need for direct assistance in attending to the practical aspects of daily life. The visa applicant (carer) must demonstrate that:

- they are willing and able to provide the necessary direct assistance to their relative; and
- the assistance required by their relative cannot be reasonably obtained from any other relative in Australia; nor from welfare, hospital, nursing or community services.

If the visa applicant (the carer) fails the health criteria there is no health waiver available.

## Fin

There are now several pathways for HIV positive people to apply to live in Australia temporarily or permanently. Pathways now exist for skilled applicants, where merely three years ago there were none. We hope that migration to Australia will become easier for HIV positive people, and that this guide helps in that process.

FOR YOUR NOTES

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