

Nationally standardized instructions for using the nationally standardized form for formal obligations with regard to Section 68 in conjunction with Sections 66 and 67 of the Residence Act (as at 15 December 2009)

Basic principles

A) The *Länder* are advised to apply information for using the standard form for formal obligations in addition to the General Administrative Regulation on the Residence Act.

B) The appropriate version of the official, forgery-proof and nationally standardized form is to be used for formal obligations.

School exchange organizations are not required to use the official form.

If, in an exceptional case, more than one person submits a formal obligation on behalf of the same foreigner (e.g. to avoid unreasonable hardship), each person submitting a formal obligation should use a separate form and should note on the form that several persons have submitted formal obligations as joint and severally liable.

C) If the foreigner is able to support him- or herself, no formal obligation needs to be submitted.

Presenting a formal obligation is not a condition for approving a visa application.

D) The person submitting a formal obligation (third party) is to be explicitly informed of the extent and duration of liability before submitting the formal obligation. The third party is to be informed that in addition to living expenses, he/she will be responsible for expenses in case of illness, departure expenses and deportation expenses in case of deportation.

The third party is to declare that he/she has not entered into any other obligations that would endanger the guarantee effect of the present formal obligation.

The third party is to be informed of the voluntary nature of the information and supporting documents he/she provides, that providing inaccurate or incomplete information may be a criminal offence under Sections 95 and 96 of the Residence Act, and that his/her data will be stored in accordance with Section 69 (2) no. 2h of the ordinance on residence.

The third party should also be informed that the existence of sufficient health insurance cover will be checked independently of the formal obligation as part of the visa procedure and is a prerequisite for issuing a visa. The legal basis for this is provided by Council Decision 2004/17/EC of 22 December 2003 (cf. Part V, point 1.4, of the Common Consular Instructions) introducing the requirement to be in possession of travel medical insurance as one of the supporting documents for the grant of a uniform entry visa for stays of up to three months (within a sixmonth period). The third party is to be informed that he/she is also responsible for expenses arising in case of sickness which are not covered by health insurance or exceed the insured amount.

E) The enclosed sample information sheet is to be used to inform persons submitting a formal obligation.

The information sheet is to be signed by the person submitting a formal obligation and added to the file, with a copy being given to that person.

1. Receipt of the formal obligation

A formal obligation made by a third party resident within the federal territory is to be submitted to the aliens authority responsible for the place where the foreigner is to reside. If the third party is ordinarily resident in a district for which a different aliens authority is responsible, he/she may submit the formal obligation and supporting documents to this aliens authority, which will forward it without delay to the responsible aliens authority. When doing so, the first aliens authority is to inform the second of any doubts as to the third party's financial capacity or other specific matters which might prevent the obligation from being fulfilled (such as multiple invitations).

Persons living abroad may submit a formal obligation to the German diplomatic representation responsible for their place of usual residence. The original of the formal obligation will be returned to the person who submitted it, who is instructed to ensure that the foreigner gets it in order to present it to the diplomatic representation responsible for issuing visas.

2. The need for a formal obligation

a) First-time issuance of a residence title

Whether a formal obligation is required always depends on the specific individual case. A formal obligation must be submitted not only for visits, but also for intended longer stays if the foreigner is not capable of supporting him- or herself in accordance with the applicable legal requirements.

If a formal obligation is to be submitted without an existing maintenance obligation over very long periods of time (e.g. in case of stays for the purpose of study), this may be recorded by a notary.

b) Extending a stay

In order to extend visas or residence permits, a new formal obligation must be submitted if the original purpose of the stay has changed and a new residence title is issued for the new purpose, and the foreigner cannot support him- or herself in accordance with the applicable legal requirements. This also applies to the extension of Schengen visas issued by another Schengen state.

3. Credit risk assessment

3.1 Assessment standard

A formal obligation can meet the requirement of sufficient support only if the third party can meet this obligation based on his/her income or other funds within the federal territory. If the third party is abroad, the authority must be certain that his/her income and funds can fulfil the requirement within the federal territory if necessary. It is not possible to enforce the recovery of funds abroad. If the aliens authority or diplomatic representation does not know whether the third party can meet this requirement, he/she must provide sufficient supporting documents. When checking the ability to pay, adequate attention should be paid in particular to the reason for or purpose of the foreigner's intended stay, the planned length of stay, the temporal limits of the formal obligation and the consolidation of the third party's residence status in federal territory.

The authority responsible for receiving the formal obligation will assess the credit risk on the basis of the information provided voluntarily and will note the result on page 2 of the form. If there is no explicit confirmation that the third party's creditworthiness has been proven or substantiated, the formal obligation is to be disregarded.

The following options are possible for noting the result of the credit risk assessment:

Evidence

In the case of intended stays of up to three months (within a six-month period) with no employment and of stays requiring the approval of the aliens authority (Section 31 ordinance on residence), appropriate evidence to demonstrate creditworthiness is required (see no. 3.2).

Substantiation

Substantiation will constitute an exception. If the aliens authority/diplomatic representation has no reason to doubt the creditworthiness of the person submitting the formal obligation, in particular on the basis of previous information (e.g. experience with earlier formal obligations and/or previous credit risk assessments), it may be sufficient in the case of intended short stays for the third party to substantiate his/her creditworthiness.

In principle, the credit risk assessment will be more thorough when there is a greater chance of the foreigner having recourse to public funds. The relevant criteria may include the length of stay, the number of previous stays, or the relationship between the foreigner and the third party.

In this case, a schematic assessment is not advisable; it is crucial that, following its assessment, the authority is convinced that the third party is able to fulfil the obligation entered into.

For the credit risk assessment, the Federal Ministry of the Interior has set no specific income amount needed for persons submitting formal obligations; instead, the necessary income is to be determined based on the circumstances of the particular case. It must be possible to demonstrate objectively that sufficient resources are available to cover the foreigner's living expenses, including the need for care in case of illness or need for long-term care, for the duration of the stay covered by the formal obligation, and any expenses arising in connection with the foreigner's return. Here it should also be taken into account whether the person has already submitted other formal obligations covering the same period.

The assessment of creditworthiness must take into account the number of family members supported by the third party and the number of foreigners being invited.

When checking the creditworthiness of the third party, the protected earnings rates specified in Sections 850 ff. of the Code of Civil Procedure must be taken into account, because income below these amounts is exempt from attachment when enforcing obligations under Section 68 of the Residence Act. Legal maintenance obligations (Section 850c (1) second sentence, (2) and (3) Code of Civil Procedure in conjunction with the publication of protected earnings rates) must also be taken into account.

If the person's income lies below the protected earnings rate, the aliens authority may require collateral in addition to the formal obligation (e.g. blocking notes on savings accounts, bank guarantees, a deposit to be paid into a custody account of the local authority) in order to avoid unreasonable hardship (e.g. in case of close relatives). If the collateral is secured in connection with an obligation under Section 66 (2) and Section 68 (1) of the Residence Act, this is to be noted on the formal obligation. The sum of money or the savings account passbook must then be provided by another party due to the insufficient creditworthiness of the person submitting the formal obligation. In cases where, due to earlier visits, the aliens authority has no doubt regarding the reliability of the person submitting the formal obligation, because this person was always able to substantiate his/her creditworthiness, it is possible to waive the requirement of collateral.

3.2 Supporting documents

When determining creditworthiness, only those supporting documents that cannot be amended after the fact will be accepted. For this reason, it is not sufficient to present current account statements or savings passbooks. In particular, the following can serve as evidence of sufficient creditworthiness:

- savings passbooks (with blocking notices or a pledge in favour of the corporation under public law belonging to the aliens authority and representing this aliens authority); blocked or frozen account
- wage and salary statements indicating monthly net income
- bank guarantees
- tax statement (as a rule, the latest available tax statement is sufficient)
- tax accountant's report determining profits
- tax notice from the tax office
- a check of company information and end-of-year accounts stored in central databases at the online company register www.unternehmensregister.de

The person submitting the formal obligation is required to cover the cost of providing supporting documents needed by the aliens authority.

When determining creditworthiness, the monthly expenses of the person submitting the formal obligation must also be taken into account (e.g. rent, mortgage debt, running costs, possible debts, insurance payments, maintenance obligations, etc.).

It is also necessary to check whether there is sufficient living space to accommodate the foreigner (Section 2 (4) Residence Act). Without prejudice to provisions of Land law, sufficient living space is defined as twelve square metres of space for each family member over age six and ten square metres of space for each family member under age six, with adequate access to shared kitchen, bath and toilet facilities. The availability of sufficient living space can be demonstrated by presenting a rental contract or official copy of an entry in the land register. Living space requirements are to be checked in relation to the planned length of stay. For short visits, it is not necessary to assess the living space of the person submitting the formal obligation.

In the case of newly established companies that do not have financial statements, appropriate documents may be presented, in case of doubt a tax notice from the tax office, to assist with the credit risk assessment. Another possibility would be presenting a tax auditor's certificate indicating that no taxes are currently owed or to be expected in future.

Persons submitting a formal obligation who are receiving benefits under the Social Code Book II or XII cannot be certified as creditworthy.

3.3 Entries / data protection

Information concerning identity, addresses and identity documents of the person submitting a formal obligation and the foreigner, as well as any accompanying family members is to be entered on the front of the form.

In case of legal persons, the company name and name of the company representative are to be entered in brackets on the front of the form. This information is to be provided by an authorized representative (company owner, manager, board member, etc.) who is to sign on the back of the form.

If different aliens authorities are responsible for the districts in which the company is located and the company representative lives, the aliens authority for the district in which the company is located will be responsible. However, the aliens authority for the district in which the company representative lives may also provide administrative assistance.

In case of companies that are not legal persons, the name of the person with personal liability is to be entered.

The statement of the third party, the certification of the authority and the result of the credit risk assessment are to be entered on the back of the form.

Occupation and name of employer may be used as criteria for applying the lessstringent assessment standard of substantiation.

Documents provided for the credit risk assessment are to be returned to the third party. The aliens authority/diplomatic representation may keep copies of the supporting documents in the files for record-keeping purposes. The result of the credit risk assessment is to be recorded in an internal note.

These documents are to be kept in a special file separate from the foreigner's file. If a new formal obligation is received or claims arise based on a formal obligation, access to the formal obligation must be ensured. As soon as it is clear that no further claim can be based on the formal obligation, these documents are to be destroyed. It is recommended that formal obligations be retained for at least six years (cf. also Section 70 (1) Residence Act).

4. Procedure

If the person submitting the formal obligation enters the information on the official form him- or herself, he or she must do so when meeting with the representative of the authority.

Because the formal obligation constitutes a unilateral declaration of intent, it is not possible for the person submitting the formal obligation to be represented by another person. Blank forms should not be handed out.

Under the heading "Comment by the aliens authority/diplomatic representation" on page 2 of the formal obligation, the authority certifies whether the creditworthiness of the person submitting the formal obligation has been proven or substantiated.

The aliens authority keeps a copy of the form with original signatures of the third party and the authority representative. The original is given to the third party, who is to send it to the foreigner so he/she can present it at the diplomatic representation during the visa application process. The foreigner keeps the original to present it at the border inspection.

If the aliens authority comes to the conclusion that the creditworthiness of the person submitting the formal obligation has not been proven or substantiated, it may not give the original of the formal obligation to the third party.

The third party is to be informed that he/she should make a copy of the formal obligation before submitting it, as the foreigner has to submit a copy of the formal obligation to the diplomatic representation.

In order to claim reimbursement under public law, the government agency which expended the public funds must issue a notification of payment.

5. Duration of validity

The duration of an obligation based on a formal obligation starts "with the presumable first day of validity of the visa on ... up to the termination of the foreigner's stay or up to the issue of a residence title for another residence purpose". For the purpose of legal certainty, this has been noted on the official forms since 1 January 2005. The foreigner remains free to leave and re-enter the country while his/her visa is still valid (e.g. for visiting purposes) (see also Section 6 (2) Residence Act).

A period of validity, such as "for three weeks starting 15 July", or "three weeks after entry", or "30 days", should never be given under the heading "Duration of obligation" on the form. In order to satisfy the principle of certainty, the formal obligation should make clear the purpose of stay and the full length of stay to which it is supposed to apply. The period of validity of the residence title issued does not matter, because in the case of intended long-term stays the formal obligation is submitted in order to enable entry and the long-term stay. The obligation resulting from the formal obligation thus applies for the length of the entire stay, regardless of the period of validity of the residence title on which the stay is based, and includes the length of any illegal stay. The obligation ends when the planned stay ends or when the original purpose of the stay changes and a new residence title is issued for the new purpose. The obligation does not end if the foreigner requests asylum after having entered with a formal obligation, because permission to reside pending asylum proceedings is not a residence title.

In order to clarify this for the person submitting a formal obligation and to avoid later misunderstandings, it may be helpful to add an asterisk to the text "on ... up to" and an asterisk below the text, followed by the presumable first day of validity of the visa.

The purpose of the foreigner's stay and the duration of stay applied for are to be entered on the second page of the formal obligation in the space for official remarks, for the information of the diplomatic representation.

The person submitting the formal obligation is free to specify a concrete period of time for maintaining his/her obligation between submitting a formal obligation and the issuing of the visa.

However, it should be noted that no more than six months should elapse between the time a formal obligation is submitted and the visa is issued, as the conditions for creditworthiness may have changed in the meantime. The person who submitted a formal obligation cannot renounce this obligation once the visa has been issued.

6. Fees

The fee for receiving and examining a formal obligation is twenty-five euros (Section 47 (1) no. 12 of the ordinance governing residence. This also includes authenticating the signature of the person submitting the formal obligation.

With regard to B) above, if more than one person submits a formal obligation for the same foreigner, each person will be required to pay the fee, i.e. if two people submit formal obligations, the fee will be fifty euros.

A fee will be charged even if creditworthiness cannot be proven or substantiated (Section 49 (2) of the ordinance governing residence).