NOTICE: Challenges to Gaining Asylum or CAT Protection in the U.S. for Eritreans Entering from Mexico

This document has been updated to March 31, 2020.

Because U.S. immigration policies are undergoing many changes, we encourage readers to check from time to time for updates to this document on The America Team’s home page: www.EritreanRefugees.org.

Highlights.

- The U.S. will no longer consider granting asylum to Eritreans arriving from Mexico unless they had sought and been denied asylum in an intermediate country (for example, in Africa or Latin America).
- Eritreans seeking to enter the U.S. from Mexico may now be prevented by Mexican authorities from proceeding north from the Guatemalan border.
- Eritreans who have applied for U.S. asylum may now have to wait for long periods prior to their hearings, either in Mexico or in U.S. detention.
- The U.S. will not grant asylum to Eritreans who had already received protection in Europe.
- Eritrean asylum denial rates in the U.S. are higher than before.
- The U.S. has been concertedly seeking to return to Eritrea many Eritreans whose asylum claims have been denied.
- Proposed U.S. rules would require asylum seekers to pay a $50 fee to apply for asylum, and would enable U.S. authorities to indefinitely delay the issuance of work permits to them after their applications had been filed.
- Many Eritreans reportedly have found themselves stranded in Mexico – either at the U.S. border or the Guatemalan border. Their circumstances are reportedly bleak: physically insecure, unable to work, and unable to proceed to the U.S.
- The coronavirus pandemic has affected the circumstances of Eritreans seeking asylum in the U.S. The America Team’s chronology of some of the impacts of the coronavirus on Eritreans appears at: http://eritreanrefugees.org/news/

Overview.

The America Team for Displaced Eritreans does not encourage individuals to seek asylum\(^1\) in the U.S., or to seek withholding from removal from the U.S. under the international Convention Against Torture (CAT)\(^2\). Nor do we discourage them from seeking such relief. In addition, we do
not facilitate or provide advice on a migrant's intended entry into the U.S. for the purpose of seeking asylum or CAT protection. But in recent years an increasing number of Eritreans do appear to have crossed into the U.S. from Mexico for that purpose (typically presenting themselves lawfully to U.S. border authorities at an official port of entry); we have assisted many of them after they have arrived here and have sought asylum and CAT protection; and we wish to inform other Eritreans who are contemplating the same of some of the challenges they may face.

1. **Asylum and CAT protection are never assured.** Grants of asylum and CAT protection in the U.S. have always been limited – not everyone who applies for asylum or CAT protection gains it. Whether an applicant wins asylum or CAT protection has long turned not only on the specific facts of his or her case, but often on the pro- or anti-asylum and CAT disposition of the particular immigration judge who happens to decide the case. In addition, the following factors on the part of the applicant significantly reduce the likelihood of success in gaining asylum or CAT protection:

   - Low proficiency in speaking, understanding and reading English
   - Lack of a competent immigration lawyer for representation
   - Lack of funds for legal representation and for making phone calls and sending correspondence
   - Having no family members or others who would serve as a sponsor in the event of release from detention and who could interface with counsel

2. **Those arriving from Europe.** Under U.S. immigration law, migrants who had obtained protected immigration status in safe countries such as those in Western Europe will generally not be granted asylum (or possibly even CAT protection) if they seek it in the U.S. Rather, U.S. authorities will generally undertake to remove them to the country in which they had held protected status, or to their home country. In the case of Eritreans, that could entail removal to Eritrea – after lengthy periods of detention in the U.S.

3. **Recent restrictions and procedures, generally.** Since early 2017, in response to a surge of (mostly) Central American migrants seeking to enter the U.S. via the Mexican border, the U.S. government has been seeking to further limit the granting of asylum to migrants who enter there, and to remove (return) those who have entered. For example, new attitudes and procedures have resulted in a drop in the overall rate of successful asylum claims in immigration court. Other examples: beginning in the spring of 2019, the U.S. caused the Mexican government to detain and deport large numbers of asylum seekers passing through that country, or to bar them from traveling north from Guatemala to the U.S. In the summer of 2019, the U.S. newly undertook to expedite removals of undocumented migrants who were apprehended in the interior of the U.S. before having applied for asylum here. Late that summer, the U.S. began conducting asylum hearings in so-called "port courts" situated in tents at the border, where obtaining legal representation is especially challenging. As of the date of this document, to what extent some of those measures have affected or will affect Eritreans is not fully known to The America Team. But meanwhile, due in part to the large number of asylum claims filed by those who have crossed the border (all nationalities combined), both the immigration court system and the removal system have been unable to keep up with the caseload. As a consequence, at a minimum, Eritreans who have entered or who seek to enter from Mexico should expect lengthy
periods of detention in the U.S. pending their asylum hearings, and again after those hearings if asylum or CAT protection is denied.

4. "Remain in Mexico." Since January 2019, the U.S. has been requiring many migrants (including Eritreans) who have entered the U.S. seeking asylum or CAT protection to return to Mexico and wait there for long periods pending their asylum and CAT hearings in the U.S. In Mexico, they often live in danger – extortion, rape and homicide at the border are rife – and do not have ready access to U.S. attorneys to help them prepare for their asylum and CAT hearings.

5. Forcible removal to Eritrea. In September 2017, the U.S. government announced a policy of aggressively removing Eritreans to Eritrea if they do not have legal immigration status here. The America Team came to believe that many or most Eritreans at risk for such removal were those who had been denied asylum and CAT protection by U.S. immigration judges – including many whose denial had been inappropriate. For some years prior to that, the U.S. appeared to have removed few Eritreans to Eritrea. Even since the new announcement, it’s unclear how many Eritreans the U.S. has succeeded in actually removing to Eritrea; but it certainly has tried. In any event, The America Team has led a nationwide advocacy effort to prevent the removals under the new policy until Eritrea is safe for those to be sent back. And at this time we consider all those who have been denied asylum and CAT protection by U.S. immigration judges to be at high risk for removal to Eritrea.

6. No asylum for those who had traveled through other countries. Beginning in July 2019, the U.S. has undertaken to implement a policy of denying asylum to most individuals who crossed the Mexican border after having traveled through other countries, unless they can prove that they applied for and were denied asylum in at least one of those other countries. Eritreans who have crossed the Mexican border have commonly traveled through multiple African and Latin American countries without having applied for asylum there; and so such asylum claims would now stand to be denied in the U.S. Indeed in late July, the U.S. agreed with the Guatemalan government that migrants passing through Guatemala (possibly including Africans) must apply for asylum there before applying in the U.S., and that the U.S. would send them back to Guatemala if they hadn't so applied.

7. Proposed rules hampering asylum applicants. In September 2019, the U.S. administration published a proposed rule pertaining to asylum seekers' current rights to request and receive work permits 150 days after filing their asylum applications. The proposed rule, if enacted, would eliminate the 30-day deadline by which immigration authorities must process asylum applicants' requests for work permits, and thus could enable the authorities to delay issuing work permits indefinitely. Because it can take up to several years for an asylum application to be adjudicated, under the proposed rule applicants could have to wait for years without being able to work lawfully. If they instead chose to work without permits, their having done so could jeopardize their ability to win asylum. In December 2019, the administration published another proposed rule that would charge asylum seekers $50 to apply for asylum.
We would add these observations:

(a) **Litigation.** Some of the above restrictions have been challenged in U.S. courts by American civil rights organizations; and so the extent to which the restrictions will survive or be enforced may change over time.

(b) **CAT claims.** Some of the above restrictions on grants of asylum do not pertain to grants of CAT protection. Thus, for example, the July 2019 order denying asylum to most who have passed through other countries without asking for asylum does not restrict CAT claims.

(c) **Engaging legal counsel.** As ever, we recommend that anyone seeking asylum or CAT protection in the U.S. engage capable immigration counsel to advise and represent them. Having a skilled immigration attorney vastly increases the likelihood of winning an asylum or CAT claim. For skilled legal representation, we encourage that counsel be sought either from well-established NGOs *pro bono* (free of charge), or from *pro bono* or fee-charging attorneys recommended by such NGOs – rather than by attorneys casually recommended by friends.

(d) **Refugees.** Just as the U.S. since 2017 has been moving to restrict the granting of asylum to those who seek it upon crossing the border, it has been radically reducing the number of refugees\(^3\) that it will admit to the U.S, from countries overseas by way of international arrangement, such as those refugees housed in United Nations refugee camps. The number of admissions may shrink further in future years. Eritreans who become United Nations refugees in other countries should have little expectation that they will be resettled in the U.S.

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\(^1\) Consistent with international law, the U.S. grants asylum to migrants who can prove that they would likely be persecuted – on grounds of their race, religion, nationality, political beliefs, or membership in a particular social group – if they were returned to their home countries. Asylees (those who have been granted asylum) may pursue a process for becoming naturalized U.S. citizens. Asylum is granted or denied to a migrant by a U.S. immigration judge following a hearing on the merits of the migrant's asylum case. The court has wide discretion as to whether to grant asylum.

\(^2\) Asylum seekers in the U.S. commonly apply for withholding from removal under CAT at the same time that they apply for asylum, and they do so on the same government form (USCIS Form I-589). To prevail in a CAT claim, a migrant need not prove that he or she faces persecution in his or her home country, but rather that he or she would likely be tortured if returned to that country. CAT protection is technically more difficult to obtain than asylum, in that it requires the claimant to prove a higher likelihood of injury. Its protections are also less ample than those secured with an award of asylum. Among other things, with CAT protection, the migrant cannot become a U.S. citizen, is not eligible for public assistance, cannot bring family members to live in the U.S., and is not assured of re-entry if he or she leaves the country. CAT protection too is granted or denied to a migrant by a U.S. immigration judge following a hearing on the merits of the migrant's case. The court technically is obligated to grant withholding if the migrant can establish that he or she has a greater than 50% chance of being tortured upon being returned.

\(^3\) In the U.S., refugees are migrants who have been designated as such by (mostly) the United Nations High Commissioner for Refugees (UNHCR) or (sometimes) a sovereign country's refugee authorities. The criteria for qualifying as a refugee are similar to those for qualifying to receive asylum – i.e., the likelihood of persecution on one of the five grounds stated above. For many decades, the U.S. has admitted a limited number of refugees from UNHCR's refugee program, usually after a long administrative process that the migrants undergo overseas. That is, refugees who have been admitted to the U.S. (including Eritrean refugees) have typically been living under the care, protection and administration of UNHCR overseas, whether in a refugee camp or in an urban environment outside of their home countries. In the U.S., refugees are distinguished from asylum seekers in that asylum seekers enter (or
seek to enter) the U.S. without having already been designated and processed as refugees outside of the U.S.; for example, asylum seekers often simply appear at a U.S. airport or at the Mexican border, at which time they declare their desire to be granted asylum. Once they are in the U.S., however, refugees – like those who have been granted asylum – may pursue a process for becoming naturalized U.S. citizens.