



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

*This document has been updated to July 18, 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](http://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.
- Asylum seekers must wait longer periods before being able to apply for and receive work permits; and if they entered the U.S. between ports of entry, they may be denied work permits altogether.
- A proposed U.S. rule would require asylum seekers to pay a \$50 fee to apply for asylum.
- Another proposed rule, if adopted, could make asylum almost impossible for Eritreans unless they flew to the U.S. directly from Eritrea on a visa, had already experienced drastic persecution or torture, and then engaged a U.S attorney from the very beginning of the asylum process.
- Many Eritreans reportedly have found themselves stranded in Mexico – either at the U.S. border or the Guatemala 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/>. Among other things, reports indicate that the U.S.'s southern border is effectively closed to asylum seekers, and almost totally closed to those who would seek protection under the Convention Against Torture (CAT).**

## **Overview.**

The America Team for Displaced Eritreans does not encourage individuals to seek asylum<sup>1</sup> in the U.S., or to seek withholding from removal from the U.S. under the international Convention Against Torture (CAT)<sup>2</sup>. 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. Work permits.** Effective August 25, 2020, asylum seekers must wait 365 days (not 150 days, as before) after applying for asylum to apply for work permits. Also, effective August 21, 2020, U.S. authorities will no longer have to issue work permits within 30 days after asylum seekers apply for them, thus enabling the government to delay issuing the permits indefinitely. The effect of those rules could be to force asylum seekers to subsist on charity during the often lengthy period – sometimes years – in which their asylum applications are pending. If they instead choose to work without permits, their having done so, if discovered, could jeopardize their ability to win asylum. In addition to the time periods described above, one of the new rules provides that a work permit will not be available to someone who entered the U.S. between ports

of entry without good cause (for example, entered there just to evade regular border processing) – even if the person then promptly presented himself or herself to border authorities and sought asylum or CAT withholding,

**8. Asylum application fees.** In December 2019, the administration published a proposed rule that would charge asylum seekers \$50 to apply for asylum.

**9. Additional proposed rule hampering asylum and CAT withholding applicants (General).**

In June 2020, the U.S. published a proposed rule with wide-ranging implications for asylum seekers. *Some commentators have written that the rule would rewrite asylum law to exclude nearly all people seeking that form of refuge.* The proposed rule would apply to asylum seekers regardless of whether they had arrived by air on a visa and then sought asylum (typically, through the “affirmative asylum” process) or instead had attempted to cross without a visa from the Mexican border (typically, through the “defensive asylum” process). The rule could also apply not only to new asylum cases but to cases that will have been pending at the time the rule becomes law – which could occur as early as the fall of 2020. Although the rule appears largely intended to deny asylum to Central Americans who flee gang and domestic violence, the following elements (among others) seem pertinent to Eritreans, including those who are fleeing religious persecution or forced national service:

(a) Asylum would not be available to individuals who had passed through at least two countries prior to arriving in the U.S. and had not sought protection there, or who had stayed in another country for at least 14 days prior to arriving in the U.S. (A similar asylum ban had already been imposed for migrants passing through third countries and then seeking to enter specifically from Mexico. One additional implication of the new proposed rule: an Eritrean who had spent time in Ethiopia or Sudan before coming to the U.S. could not receive asylum here, even if flying in. Another possible implication: if an asylum seeker’s flight from Eritrea to the U.S. stops at two intermediate airports, the proposed rule may bar asylum.)

(b) Anyone who could have resettled in a third country on their way to the U.S. – even if they didn’t know it was a possibility – would be considered to have “firmly resettled” in that country, and thus would be denied asylum in the U.S.

(c) If an individual crosses the border irregularly – that is, secretly and not at an official port of entry – that action would constitute a “significant adverse factor” as to whether the person would be awarded asylum.

(d) If an individual arrives in the U.S. without Eritrean papers or travel documents, that could adversely affect the availability of asylum.

(e) If an asylum officer or an immigration judge were to determine that an asylum application is “frivolous” – which could arise if the applicant simply didn’t know a pertinent element of the law foreclosing the possibility of asylum for him or her – the individual would be forever banned from any other immigration relief, such as receiving a visa, including a family reunification visa.

(f) An immigration judge could elect to deny asylum to an individual without a hearing if the written asylum application didn’t make a “*prima facie*” (i.e., a somewhat credible and properly articulated) case for asylum. Thus, for example, an individual who had submitted an asylum application without counsel and who had hoped to find counsel afterwards could be denied the opportunity to appear in immigration court with counsel, and to win asylum.

(g) Asylum would be denied to applicants who couldn't prove that persecutory laws and policies in their home countries would be applied to them personally (e.g., they might now have to actually be harmed before they could flee and claim asylum here).

(h) Similarly, asylum claims would be denied if they were based only on harassment, threats and short-term detention in their home countries. (The America Team notes that that limitation conceivably could impact whether asylum would be granted to Eritreans in common fact patterns that we have seen.)

(i) Asylum would be granted on grounds of the individual's fear of persecution for holding a political opinion only if the "applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof." (The America Team notes that those limitations conceivably could impact whether asylum would be granted to Eritreans fleeing the national service.)

(j) Individuals would experience heightened screening processes at the border.

(k) Individuals would have new, additional burdens for proving that they could not have moved to another location within their country of origin in order to avoid persecution or torture.

(l) If an asylum seeker were found by an asylum officer not to have a "credible fear" of being persecuted in his or her home country, it would be more difficult to appeal that determination to an immigration judge.

(m) The present requirement to file for asylum within one year of entering the U.S. would be made absolute, thus eliminating various current exceptions, such as for hardship.

(n) If an asylum seeker would commit even minimal errors, omissions or delays in paying U.S. taxes while waiting for asylum, he or she would be denied asylum. (Because asylum seekers may not lawfully be employed in the U.S. for a year while awaiting their asylum rulings, they would be at great peril of denial if they worked in the informal economy; how they were expected to survive during that period was unclear from the proposed rule.)

(o) To prevail on a CAT withholding claim, the individual's burden would be raised from showing a "significant possibility" of being tortured to a "reasonable" possibility, if returned to the country of origin. (Although that change appears minor and highly legalistic, it could make achieving CAT protection more difficult.)

Some of the above provisions in the proposed rule relating expressly to asylum pertain to CAT protection as well. Others do not.

*Some commentators have said that if the proposed rule were enacted as-is, almost the only people who could fairly hope to be granted asylum would be those who had been grievously persecuted in their home countries, who would fly directly to the U.S. from their home countries, and who would be represented by capable counsel immediately upon their arrival here.* That would not necessarily be true for those seeking CAT protection.

#### **10. Additional proposed rule affecting asylum and CAT withholding applicants (Covid-19).**

In July 2020, the U.S. published yet another proposed rule which, if adopted, would impose yet more restrictions on asylum and CAT withholding applicants, now on grounds of the coronavirus pandemic. The proposed rule characterizes "deadly communicable diseases" (presumably, such as Covid-19) as national security threats, and it grants U.S. border authorities expanded rights to remove migrants coming from or through countries where such diseases are "prevalent or epidemic" (presumably, as of today, nearly every country on earth). Among other things, should

such a migrant fear being tortured if removed to his or her home country, he or she would have to prove the likelihood of that torture to immigration officials right at the border, without a hearing before an immigration judge, and (as a practical matter) probably without an attorney. And even if the migrant proved that likelihood, and thus was entitled to CAT protection, the border authorities could quickly remove him or her to a third country where he or she would not be tortured – again, without a hearing before an immigration judge.

We would add these observations to the above enumerated topics:

(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<sup>3</sup> 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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<sup>1</sup> 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.

<sup>2</sup> 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

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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.

<sup>3</sup> 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.