

THE NEW U.S. TRAVEL BAN ON ERITREA

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On January 31st 2020, the U.S government issued a Proclamation that imposed country specific travel ban on six countries: Eritrea, Nigeria, Sudan, Tanzania, Myanmar and Kyrgyzstan. The Travel Ban, named “Proclamation on Improving Enhanced Vetting Capabilities and Processes for Detecting Attempted Entry,” will take effect at 12:01 AM Eastern Standard Time on February 21, 2020. The agency estimated that the new restrictions will affect more than 12,000 travelers.

Eritrean Foreign Minister Osman Saleh Mohammed said that the Government of Eritrea saw the ban as a political move that would hurt the country's relations with the United States. In its Face Book page, the U.S Embassy in Eritrea posted that the Eritrean and the U.S governments are working together as partners to resolve issues of mutual concern so that the restrictions on immigrant visas can be removed as quickly as possible.

The Proclamation either limits or suspends the entry into the United States of nationals of the six countries that are subject to the new travel ban. It imposes country specific travel ban depending on the criteria that the US government sets. While the Travel Ban on Eritrea, Nigeria, Kyrgyzstan and Burma is suspension of immigrant visa to the nationals of these countries, except Special Immigrants, the ban on the Sudan and Tanzania is suspension on the entry into the United States of their nationals as Diversity Immigrants (beneficiaries of Diversity Visa Lottery).

WHY TRAVEL BAN ON ERITREANS?

Section 1 (c)(ii) of the Proclamation states that the entry into the United States of nationals of Eritrea as immigrants, except as Special Immigrants, whose eligibility is based on having provided assistance to the United States Government, is hereby suspended.

On September 13, 2017, the Department of Homeland Security announced, in coordination with the State Department, the implementation of visa (non-immigrant) sanctions on Cambodia, Eritrea, Guinea, and Sierra Leone due to lack of cooperation in accepting their nationals ordered removed from the United States. Thus, issuance of all immigrant (with few exceptions) and non-immigrant visas to Eritrean nationals has been suspended.

The Proclamation gave the following reasons for the suspension of nationals of Eritrea as immigrants:

- 1) Eritrea does not comply with the established identity-management and information-sharing criteria assessed by the performance metrics.¹
- 2) Eritrea does not issue electronic passports or adequately share several types of information, including public-safety and terrorism-related information, that are necessary for the protection of the national security and public safety of the United States.
- 3) Eritrea is currently subject to several nonimmigrant visa restrictions.
- 4) Eritrea does not accept return of its nationals subject to final orders of removal from the United States, which further magnifies the challenges of removing its nationals who have entered with immigrant visas.

“It is fundamental to national security, and the height of common sense, that if a foreign nation wishes to receive the benefits of immigration and travel to the United States, it must satisfy basic security conditions outlined by America’s law-enforcement and intelligence professionals,” White House Press Secretary Stephanie Grisham said in a statement.

¹ The refined and modified specific performance metrics developed by the Department of Homeland Security to assess compliance include;

- whether a country shares certain needed information and for how frequently the country shares that information and the extent to which that data contributes to border and immigration screening and vetting.
- Whether a country issued electronic passports at all and whether a country issues electronic passports for all major classes of travel documents.
- Whether a country had prior instances of reporting loss or theft to the International Criminal Police Organization (INTERPOL) and whether the country has reported lost or stolen passports to INTERPOL within 30 days of a report of a loss or theft.

Who is affected by the new ban?

Nationals of Eritrea as immigrants.

The ban shall apply to Eritrean nationals who:

- are outside the United States on the applicable effective date of this proclamation;
- do not have a valid visa on the applicable effective date of the new proclamation; and
- do not qualify for a visa or other valid travel document under section 6(d) of Proclamation 9645.

Who is exempted from the ban?

The Proclamation cross references exceptions in Sec. 3(b) of Proclamation 9645. Section 3(b) of Proclamation 9645 stipulates that the suspension of entry shall not apply to:

- any lawful permanent resident of the United States;
- any foreign national who is admitted to or paroled into the United States on or after the applicable effective date under section 7 of this proclamation;
- any foreign national who has a document other than a visa — such as a transportation letter, an appropriate boarding foil, or an advance parole document — valid on the applicable effective date under section 7 of this proclamation or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission;
- any dual national of a country designated under section 2 of this proclamation when the individual is traveling on a passport issued by a non-designated country;
- any foreign national traveling on a diplomatic or diplomatic-type visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or
- any foreign national who has been granted asylum by the United States; any refugee who has already been admitted to the United States; or any individual who has been granted

withholding of removal, advance parole, or protection under the Convention Against Torture.

- This Proclamation does not restrict the travel of dual nationals, so long as they are traveling on the passport of a non-designated country.

In addition to the above list, American Immigration Lawyers Association, AILA, stated that in an October 2018 meeting between AILA's Department of State (DOS) Liaison Committee and the DOS Visa Office, DOS provided additional clarification regarding the exceptions under section 3(b) of the travel ban. Specifically, DOS clarified that the following individuals from banned countries who are present in the United States on the applicable effective date would not be subject to any of the travel ban travel restrictions:

- Those present in the United States on the applicable effective dates in one nonimmigrant visa category, who depart the United States and apply for a nonimmigrant visa in a different category or an immigrant visa.
- Those present in the United States after the expiration of their nonimmigrant status on the applicable effective date who depart the United States and apply for a nonimmigrant visa in a different category or an immigrant visa.
- Those in possession of a valid visa on the applicable effective date for the relevant nationality, but not present in the United States, who apply for a different nonimmigrant visa or an immigrant visa.

It is believed that the above clarification that applies to the previous travel bans stands valid and the exceptions apply to the current ban.

WHAT ARE THE TYPES OF VISAS THAT ARE SUSPENDED (FOR ERITREANS)?

Further directives and guidance are expected to implement the Travel Ban. The Secretary of State and the Secretary of Homeland Security shall coordinate to update guidance, if necessary, to implement the Proclamation as to nationals of the six countries, including Eritrea, consistent with the provisions of the Proclamation.

Pending the issuance of directives or guidance, reasonable explanation may be provided based on the implementation the travel ban that placed restrictions on citizens of Iran, Libya, Somalia, Syria, Yemen, Venezuela, and North Korea.

Although there are many types of immigrant visas, the following are the types of immigrant visas most relevant to nationals of Eritrea.

SYMBOL	CLASS
IMMEDIATE RELATIVES	
IR1	Spouse of U.S. Citizen
IR2	Child of U.S. Citizen
IR3	Orphan Adopted Abroad by U.S. Citizen
IR5	Parent of U.S. Citizen at Least 21 Years of Age
CR1	Spouse of U.S. Citizen (Conditional Status)
CR2	Stepchild of U.S. Citizen (Conditional Status)
IW1	Certain Spouses of Deceased U.S. Citizens
IW2	Child of IW1
IB1	Self-petition Spouse of U.S. Citizen
IB2	Self-petition child of U.S. Citizen
IB3	Child of IB1
SPECIAL VISA	
SB 1	Returning Resident
SC1	Person Who Lost U.S. Citizenship by Marriage
SI	Special Visa
FAMILY 1ST PREFERENCE	
F11	Unmarried Son or Daughter of U.S. Citizen
F12	Child of F11
B11	Self-petition Unmarried Son or Daughter of U.S. Citizen
B12	Child of B11
FAMILY 2ND PREFERENCE (Subject to Country Limitations)	
F21	Spouse of Lawful Permanent Resident
F22	Child of Lawful Permanent Resident
F23	Child of F21 or F22
F24	Unmarried Son or Daughter of Lawful Permanent Resident
F25	Child of F24

C21	Spouse of Lawful Permanent Resident (Conditional)
C22	Stepchild of Alien Resident (Conditional)
C23	Child of C21 or C22 (Conditional)
C24	Unmarried Son or Daughter of Lawful Permanent Resident (Conditional)
C25	Child of F24 (Conditional)
B21	Self-petition Spouse of Lawful Permanent Resident
B22	Self-petition Child of Lawful Permanent Resident
B23	Child of B21 or B22
B24	Self-petition Unmarried Son or Daughter of Lawful Permanent Resident
B25	Child of B24
FAMILY 2ND PREFERENCE (Exempt from Country Limitations)	
FX1	Spouse of Lawful Permanent Resident
FX2	Child of Lawful Permanent Resident
FX3	Child of FX1 or FX2
CX1	Spouse of Lawful Permanent Resident (Conditional)
CX2	Stepchild of Lawful Permanent Resident (Conditional)
CX3	Child of CX1 or CX2 (Conditional)
BX1	Self-petition Spouse of Lawful Permanent Resident
BX2	Self-petition Child of Lawful Permanent Resident
BX3	Child of BX1 or BX2
FAMILY 3RD PREFERENCE	
F31	Married Son or Daughter of U.S. Citizen
F32	Spouse of F31
F33	Child of F31
C31	Married Son or Daughter of U.S. Citizen (Conditional)
C32	Spouse of C31 (Conditional)
C33	Child of C31 (Conditional)
B31	Self-petition Married Son or Daughter of U.S. Citizen
B32	Spouse of B31
B33	Child of B31
FAMILY 4TH PREFERENCE	
F41	Brother or Sister of U.S. Citizen at Least 21 Years of Age
F42	Spouse of F41
F43	Child of F41
DIVERSITY IMMIGRANTS	
DV1	Diversity Immigrant

DV2	Spouse of DV1
DV3	Child of DV1
V92 AND V93 VISA	
V92	Spouse or child of an alien granted asylum
V93	When “Refugee/Asylee Relative Petition” to have their family members join them,

The Proclamation seems to suspend most of the immigrant visa categories except visas to refugees, V92, V93 and Special Visa.

V92, V93 VISA

The Proclamation stipulates that all immigrant visas are suspended. However, based on the application of the previous travel ban and Acting Homeland Security Secretary Chad Wolf’s statement, the visa restrictions will not apply to refugees, according to the official. These are related to visas for spouse or child of an alien granted asylum and visas when refugee/asylee petition to have their family members join them.

SPECIAL VISA

The Proclamation also stipulates that applicants under Special Immigrant programs generally do not need to demonstrate the same work or familial ties as other immigrant visas, but do need to show other unique qualifications, to prove that they are exempted. Thus, Special Immigrants are those who have advanced United States interests (and their eligible family members), such as foreign nationals who have worked for a United States Embassy for 15 years or more and are especially deserving of a visa.

WAIVERS

The Proclamation allows for waivers despite the suspensions and limitations on entry. A consular officer, or the Commissioner, United States Customs and Border Protection (CBP), or the Commissioner’s designee, as appropriate, may, in their discretion, grant waivers on a case-by-case basis to permit the entry of foreign nationals for whom entry is otherwise suspended or limited if such foreign nationals demonstrate that waivers would be appropriate and consistent with the purpose of the provisions of the Proclamation.

According to the DOS, there is a three-step analysis conducted by a consular post to determine visa eligibility for nationals of countries subject to the travel ban. The consular post determines if the applicant is 1) eligible for the visa category; and 2) in a category of person exempt from the travel ban; or 3) eligible for a waiver pursuant to section 3(c) of the Presidential Proclamation.²

For those applicants who are not exempt from the ban, a waiver must be sought at the time of making the visa application. There is no form or fee required and consular officers are instructed to make a determination of eligibility for the ban for each applicant. Determining eligibility for a waiver requires evaluating each of the three criteria outlined in the Proclamation. These are: 1) undue hardship to the applicant if entry to the U.S. is denied; 2) entry would be in the U.S. national interest; and 3) entry would not be a threat to national security. The first two criteria are decided at the consulate. The consular post generally adjudicates the first two criteria on its own. However, the post may request guidance from the Visa Office (VO) if it seeks to clarify eligibility under the first two criteria.³

A waiver may be granted only if a foreign national demonstrates to the consular officer's or CBP official's satisfaction that:

- denying entry would cause the foreign national undue hardship;
- entry would not pose a threat to the national security or public safety of the United States;
- and
- entry would be in the national interest.

Undue Hardship Criterion

The Proclamation does not define “undue hardship” nor does the term appear in the immigration statute. DOS has issued minimal guidance to the public in December 2017 about how the Proclamation and waiver scheme would be implemented by DOS, but did not provide a definition of “undue hardship.”

² AILA Doc. No. 18032130. (Posted 12/10/18).

³ Ibid

In a letter from the Assistant Secretary of Legislative Affairs of DOS to Senator Van Hollen dated February 22, 2018, DOS indicated that in order to satisfy the undue hardship criterion: “the applicant must demonstrate to the satisfaction of the consular officer that an unusual situation exists that compels immediate travel by the applicant and that delaying visa issuance and the associated travel plans would defeat the purpose of the travel.”⁴ It is believed that this standard will also apply to the present Proclamation.

National Interest Criterion

In considering whether an applicant’s entry to the United States would be in the national interest, the DOS indicated in a February 22, 2018 letter that “ ... if the applicant demonstrates to the consular officer’s satisfaction that a U.S. the applicant’s travel may be considered in person or entity would suffer hardship if the applicant could not travel until after visa restrictions imposed with respect to nationals of that country are lifted.”⁵

National Security / Public Safety Criterion

In evaluating whether an applicant’s entry would not pose a threat to the national security or public safety of the United States, the DOS indicated in its February 22, 2018 letter that to establish that the applicant does not constitute a threat to national security or public safety: “the consular officer considers the information-sharing and identity management protocols and practices of the government of the applicant’s country of nationality as they relate to the applicant. If the consular officer determines, after consultation with the Visa Office, that an applicant does not pose a threat to national security or public safety and the other two requirements have been met, a visa may be issued with the concurrence of a consular manager.”

REVISION OR MODIFICATION OF THE PROCLAMATION

Section 4 (a) of the Proclamation on Adjustments to Removal of Suspensions and Limitations, states that the Secretary of Homeland Security, in consultation with the Secretary of State, shall on

⁴ Ibid

⁵ Ibid

October 1, 2020, and annually thereafter, submit to the President the results of an evaluation as to whether to continue, terminate, modify, or supplement any suspensions of, or limitations on, the entry on certain classes of nationals of countries.

The six countries recommended for restrictions in the January 2020 proposal are among the worst performing in the world. However, there are prospects for near-term improvement for these six countries, the Proclamation determines. The reasons for these optimistic expectations are that each has a functioning government, each maintains productive relations with the United States, most of the newly identified countries have expressed a willingness to work with the United States to address their deficiencies. However, it has been acknowledged that despite the positive expectations, it may take some time to identify and implement specific solutions to resolve the deficiencies.

It seems that the next revision on adjustments to removal of suspensions and limitations will be on October 1, 2020 although the Proclamation assures that these countries will be given an opportunity to show specific improvements in their deficiencies within the next 180 days.

The Proclamation acknowledged that Eritrea has engaged with the United States about its deficiencies, but it also requires significant reforms to its border security, travel-document security, and information-sharing infrastructure. Improvements in these areas will increase its opportunities to come into compliance with the United States Government's identity-management and information-sharing criteria.

The Proclamation anticipates that diplomatic engagement and requests for specific improvements during a defined 180-day period would be more appropriate and more likely to result in immediate improvements in these five countries.

The Proclamation assures that these countries will be given an opportunity to show specific improvements in their deficiencies within the next 180 days because:

- Each of these five countries provides critical counterterrorism cooperation with the United States and therefore holds strategic importance in countering malign external actors;

- In several of the five countries, the United States has experienced a recent deepening of diplomatic ties that generally mark increased cooperation toward achieving key regional and global United States foreign policy goals;
- Importantly, all five countries have credibly communicated willingness to work directly with the United States Government to correct their outstanding deficiencies, and the United States believes progress is imminent for several countries and underway for others.

Conclusion

The U.S government acknowledges that Eritrea has engaged with the United States about its deficiencies, but it also requires significant reforms to its border security, travel-document security, and information-sharing infrastructure. Improvements in these areas will increase its opportunities to come into compliance with the United States Government's identity-management and information-sharing criteria.

The countries will also be given 180 days to make specific improvements in their deficiencies and the next revision of the ban will be on October 20, 2020. The U.S. Embassy in Eritrea also stated in its Facebook page that the Eritrean and the U.S. governments are working together as partners to resolve issues of mutual concern so that the restrictions on immigrant visas can be removed as quickly as possible.

Despite the optimism in the Proclamation and a statement from the U.S. Embassy in Eritrea, lifting the suspension of visa seems to depend on the performance of the Government of Eritrea as per the metrics set by the U.S government. In the meantime, Eritreans will bear the social, economic, cultural and psychological consequences of forced family separation.