



About the Defensive Asylum Process in the United States

Asylum is a form of protection that allows eligible individuals to remain in the United States instead of being returned to their home countries where they fear persecution or torture on account of their race, religion, nationality, membership in a particular social group, or political opinion.

Please be aware that the Safe Third Country Agreement between the U.S. and Canada requires asylum seekers to apply for asylum in whichever of these two countries they arrive in first. So, an asylum seeker who travels through the U.S. but applies for asylum at a Canadian land border will be turned back and instructed to pursue their asylum claim in the U.S. (and vice versa). Also, if an asylum applicant's case is denied by the U.S., they will generally be unable to apply for asylum in Canada.

For the complete list of bars to applying for or receiving asylum in the U.S., please see:
<https://www.uscis.gov/humanitarian/refugees-asylum/asylum/asylum-bars>

There are two types of U.S. asylum processes:

The *affirmative asylum process* is for individuals who are physically present in the U.S., have submitted an I-589, Application for Asylum and for Withholding of Removal within one year of arriving in the U.S. (unless they qualify under certain exceptions), and have not been placed in removal proceedings before an immigration judge.

The *defensive asylum process* is for individuals who have been placed in removal proceedings before an immigration judge. A defensive application for asylum occurs when you request asylum as a defense against removal from the U.S. by the immigration court with the Executive Office for Immigration Review (EOIR).

You will be subject to the defensive asylum process if:

You enter the U.S. at a port of entry such as an airport or border crossing without proper documentation to be admitted into the U.S.,
you enter the U.S. without proper documentation and are apprehended by Customs and Border Protection (CBP) officers within 100 miles of the border in the first two weeks after entry, or
you are otherwise apprehended by Immigration and Customs Enforcement (ICE) officers in the U.S.

In the first two scenarios you will be questioned by CBP officers and, if you do not have proper documentation to be admitted into the U.S., you will be subject to expedited removal (i.e. returned to your home country without a court hearing) unless you ask for asylum and a credible fear interview.

The length of the asylum process varies, but the defensive asylum process is likely to take several years (with the possibility of spending at least part of that time in immigration detention). Defensive asylum applicants must go through the immigration court system, which faces enormous backlogs (as of March 2019, the national backlog was over 855,000 cases).

How and When Should I Request Asylum?

During your initial contact with CBP or ICE officers, you should inform them that you want to apply for asylum in the U.S. because you have a fear of persecution or torture if you return to your home country, and specify that you want a credible fear interview. Ask for an interpreter if you are not fluent in English.

What Happens Once I Request Asylum?

Before the formal credible fear interview, a CBP officer will conduct a shorter credible fear screening. You will be taken into custody during this process. Asylum seekers are generally held in U.S. immigration detention facilities during this screening process, and screenings may be conducted days after difficult journeys to the U.S. You will not be allowed to meet with an attorney, family, etc. during this screening.

It is **very important** that you contact an asylum attorney if you are detained. Family members may help you find an attorney who can make contact with you while you are in detention, and other detainees may have information about attorneys you can contact. (Please refer to our other legal guides available [here](#) for additional information. And search our [resource catalog](#) to find a LGBTQ-friendly legal service provider near you).

CBP officers conduct brief credible fear screenings to determine whether to refer you to an asylum officer for a formal credible fear interview to show your well-founded fear of persecution or torture - or, under the Remain in Mexico policy, whether it is more likely than not you would be persecuted or tortured - on account of your race, religion, nationality, membership in a particular social group, or political opinion. The CBP officer should give you an orientation to the credible fear process and a list of free or low cost legal service providers (in English). Or, you may obtain this list by calling 1-800-870-3676 or visiting the U.S. Department of Justice (DOJ), Executive Office for Immigration Review (EOIR) website at: www.justice.gov/eoir/list-pro-bono-legal-service-providersmap

If you seek asylum at a southwest border crossing subject to the Remain in Mexico policy, the U.S. government has been limiting the number of asylum seekers it processes each day (known as "metering"). Your name will be added to a waiting list, and it could take weeks to speak with a CBP officer and complete the initial fear screening. This policy allows officers to conduct the fear screening by phone, video, or in person.

During the credible fear screening, the CBP officer should take your sworn statement describing your fear of persecution or torture in your home country and give you a copy of Form I-867A/B, Evaluation of Credible Fear Referral in Expedited Removal and have you sign Form I-877, Record of Sworn Statement in Administrative Proceedings. If the officer issues a credible fear referral in your case, you should also receive a Form M-444, Information about Credible Fear Interview in Expedited Removal Cases.

If you are not fluent in English, be sure to state your need for an interpreter during this screening and before you sign the Form I-877, Record of Sworn Statement in Administrative Proceedings prepared by the CBP officer during this screening. It is crucial to your case to check that the officer filled out this form completely and accurately.

Although it may be hard to trust law enforcement, is best to be forthcoming, explicit, and thorough when describing the details of your asylum claim with officers. If you omit important details in your first interview but include them in later communications/court hearings, the government will most likely try to discredit your case. (Please refer to our other legal guides available [here](#) for additional information. And search our [resource catalog](#) to find a LGBTQ-friendly legal service provider near you).

How Long Do I Have to Wait Until the Credible Fear Interview?

Asylum seekers who are detained should be given at least forty-eight (48) hours to prepare for their credible fear interviews with asylum officers unless they waive (give up the right to) the waiting period. In most situations, they must wait days or even weeks in detention before the interview takes place.

It is strongly recommended that you contact an attorney who can help you prepare for the credible fear interview if at all possible. To find an attorney who can help detained asylum seekers, search the AsylumConnect resource catalog (input your location in the U.S. and click on the "Legal - Immigration Detention" service type): <https://catalog.asylumconnect.org>

What Happens During the Credible Fear Interview?

The asylum officer will ask you questions (either in person or via telephone or satellite communication) to assess whether you have a well-founded fear of persecution or torture - or, under the Remain in Mexico policy, whether it is more likely than not you would be persecuted or tortured - on account of your race, religion, nationality, membership in a particular social group, or political opinion.

While trained asylum officers employed by the U.S. Citizenship & Immigration Services (USCIS) have previously conducted credible fear interviews, the U.S. government started a pilot program in April 2019 that authorizes CBP officers to conduct credible fear interviews upon completion of a two-week training, which may not include the same sensitivity training on LGBTQ issues received by USCIS asylum officers.

The interviewer will receive notes about the date you entered the U.S., the place of entry into the U.S., and whether you initially claimed fear of persecution or torture. It is very important that you keep detailed notes about your story and remain consistent in your testimony throughout the entire process. For those asylum applicants who do not have documentation or other proof of their claims, the quality of their own testimony becomes crucial. (Please refer to our other legal guides available [here](#) for additional information. And search our [resource catalog](#) to find a LGBTQ-friendly legal service provider near you).

Lastly, the interviewer will give a brief summary statement and ask whether the applicant has anything he/she/they would like to add.

What Happens If I Pass My Credible Fear Interview?

If you pass the credible fear interview, the officer will refer you to immigration court. If needed, and at your request, immigration court should provide you with a qualified interpreter for any proceedings.

You might remain in detention even after the asylum officer confirms your asylum claim as credible (sometimes for months or longer), unless they decide you are unlikely to flee and do not pose a safety threat, which will be determined on a case-by-case basis. If you entered through a port of entry, you may be paroled from detention by ICE. If you were apprehended by CBP, you may request a bond hearing before an EOIR immigration judge. If released upon payment of the bond, many asylum seekers are monitored by GPS ankle bracelets.

Please be aware that, under the Remain in Mexico policy (Migrant Protection Protocols) that took effect in January 2019, certain individuals seeking asylum in the U.S. along the southwest border between Mexico and the U.S. may be forced to wait in Mexico during the asylum process. It may take U.S. asylum applicants who are waiting in Mexico up to a year (and possibly longer) to have their first immigration court date in the U.S.

(Please refer to our other legal guides available [here](#) for additional information. And search our [resource catalog](#) to find a LGBTQ-friendly legal service provider near you).

Do I Have To Submit Form I-589, Application for Asylum and for Withholding of Removal After I Pass My Credible Fear Interview?

Yes. when you are put in immigration court proceedings (i.e. you have been served with Form I-221, Order to Show Cause and Notice of Hearing; Form I-122, Notice to Applicant for Admission Detained for Hearing Before an Immigration Judge; Form I-862, Notice to Appear; or Form I-863, Notice of Referral to Immigration Judge), you are required to file the Form I-589 with the immigration court with jurisdiction over your case. At the master calendar hearing, counsel for the Department of Homeland Security (DHS) will give you instructions for providing biometric and biographical information to USCIS that you must follow. You can find these instructions at: www.uscis.gov/laws/immigrationbenefits-eoir-removal-proceedings

It is **strongly recommended** that you contact an attorney who can help you prepare and submit your I-589 application if at all possible. To find an attorney, search the AsylumConnect resource catalog (input your location in the U.S. and click on the "Legal - Immigration Detention" service type): <https://catalog.asylumconnect.org>

Alternatively, the United Nations High Commissioner for Refugees (UNHCR) may be able to assist you in identifying qualified representatives to help you complete the application. RefWorld, a resource database available on UNHCR's website or at www.refworld.org, provides useful country conditions information from a variety of sources. Asylum seekers in detention centers and jails may call the UNHCR toll-free by dialing #566 or 1-888-272-1913 on Monday, Wednesday, and Friday from 2 p.m. - 5 p.m. (Eastern Standard Time).

However, it will be very difficult and risky to attempt this without an attorney. For instance, in addition to filing your Form I-589 with the Immigration Court, you will need to provide a copy to the appropriate ICE Office of the Chief Counsel, and then you must complete additional requirements before the immigration judge can grant relief or protection in your case.

Note: Any time you change your address, and if you are already in immigration court proceedings, you must notify the Immigration Court on EOIR Form 33/IC, Alien's Change of Address Form/Immigration Court, of any changes of address within 5 days of the change of address. You must send the notification to the immigration court having jurisdiction over your case. You can access the form here: <https://www.justice.gov/eoir/list-downloadable-eoir-forms>

Also, you must notify U.S. Citizenship & Immigration Services within 10 days of moving by submitting the "Alien's Change of Address Card" (Form AR-11) online. Intentionally failing to give U.S. Citizenship & Immigration Services your new address is considered a misdemeanor that can be punished by a fine of up to \$200 and up to 30 days in jail. You can access the online form here: <https://egov.uscis.gov/coa/displayCOAForm.do>

Can I Apply For Employment Authorization?

Yes. You may request permission to work if your asylum application is pending and 150 days have lapsed since your I-589 application was accepted by USCIS or the immigration court. If your asylum application has not been denied within 180 days from the date of filing a complete asylum application, you may be granted permission to work by filing Form I-765, Application for Employment Authorization, with USCIS. You can also apply for a restricted Social Security Card in this application. There is no fee to apply for your first Employment Authorization Document (EAD) if you have a pending asylum application or if you have been granted asylum. (Available at: <http://www.uscis.gov/humanitarian/refugees-asylum/asylum>. For filing addresses: <https://www.uscis.gov/i-765-addresses>)

What Happens If I Do Not Pass My Credible Fear Interview?

If you do not pass the credible fear interview, the interviewer should give you a written decision and a transcript of the interview, and you will be ordered to be removed from the U.S.

You may seek a credible fear review hearing before an immigration judge in an effort to appeal the asylum officer's negative decision. The immigration judge will either a) affirm the asylum officer's denial, which means you will not have a right to a hearing or to file applications for relief, including asylum; or b) vacate the removal order so your asylum claim can proceed.

At this credible fear review hearing, the judge will not ask for your full testimony. The judge may ask you an abbreviated version of the questions previously asked at your credible fear interview. Or, the judge might only ask if the information you told the officer during your credible fear interview was true, and if there is anything else you want to add.

It is critical that you consult with an attorney beforehand to help you explain why the asylum officer was incorrect as a matter of fact and law in concluding there was not a significant possibility that you could establish eligibility for asylum at a full hearing before an immigration judge. While the judge has discretion whether to allow an attorney or other consultants to be present at a credible fear review hearing, it is **very important** that you seek legal advice and guidance to prepare clear, persuasive, and brief answers.

For instance, for a credible fear review hearing based on a claim of LGBTQ persecution, an experienced attorney can help you describe:
the particular social group in question;
how this group satisfies the legal requirements of immutability, particularity, and social distinction;
the inability or unwillingness of your home country's government to protect you from persecution; and
how internal relocation within your home country would be unreasonable.

Are you looking for support during the LGBTQ asylum process? Visit the [AsylumConnect website](#) to find verified LGBTQ- and immigrant-friendly services in the U.S. and Canada

Are you are traveling through or waiting in Mexico to seek LGBTQ asylum in the U.S.? Visit the [AsylumConnect website](#) for a list of local LGBTQ-friendly organizations in Mexico.