

Advising Immigrant Clients about the Consequences of Accepting an Adjudgment Contemplating Dismissal under N.Y. Crim. Proc. Law § 170.55



Last Update: December 8, 2020

Department of Homeland Security (DHS) Consideration of an ACD, Generally

An Adjudgment in Contemplation of Dismissal (ACD) does not require a guilty plea or any admission to the charges and therefore the acceptance of an ACD alone is not a conviction for immigration purposes.¹

During the adjournment period (while the case is adjourned, but not yet dismissed), the case will be considered “open” by immigration courts and agencies. As a result, clients should be advised the case may:

- Complicate return to the U.S. from international travel;
- Impact the adjudication of immigration applications; and/or
- Impact removal (deportation) proceedings.

While many clients need only the advice provided in this resource about the consequences of accepting an ACD. However, for some, there will be complicating factors that require individualized analysis. Many of the scenarios in which we recommend getting individualized advice are laid out in the Note on Issue Spotting.

¹ An Adjudgment Contemplating Dismissal is entered before entry of plea or guilty or commencement of trial, but after charges are filed in court. N.Y. Crim. Proc. Law. § 170.55(1). The definition of “conviction” used within the immigration law requires (1) a formal judgment of guilty, or, where judgment has been withheld, a finding of guilt by a judge or jury, a guilty plea, or admission of facts by the defendant that warrant a finding of guilt; and (2) a judicially imposed punishment or restraint on the defendant’s liberty. INA § 101(a)(48)(A), 8 USC 1101(a)(48)(A).

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Note on Issue Spotting

The below scenarios are not addressed by this advisory. You should contact the client’s immigration attorney or IDP for individualized advice.

Visa revocation. Client has received an email or other communication from the Department of State about the status of their visa after the date of arrest.

Fear of retribution. Client expresses fear that protest-related activity will cause a negative impact in the country of nationality.

Travel issues.

- Client has plans to travel and is not a lawful permanent resident.
- Client is in an immigration status which requires them to leave the U.S. before the adjournment period has concluded.
- Client has a pending citizenship application and is planning to travel during the adjournment period.

Pending immigration application or removal case. Client has a pending immigration application or must submit an application during the adjournment period. Client has an open removal (deportation) case or an appeal or motion pending on a removal order.

Contact the Padilla Support Center

Webform: www.immdefense.org/psc
Email: attorneyadvice@immdefense.org
Phone: 212-725-6422

Impact on travel

Ask clients:

- Do you have plans to travel internationally in the next six months? If so, are you able to delay the trip?
- If there is an emergency (such as the sickness or death of a loved one living outside the U.S.) during the adjournment period, will you need to travel outside of the U.S.?

Because an ACD does not ultimately result in a conviction for immigration purposes, the acceptance of an ACD alone will not result in removal proceedings for clients returning from a trip abroad. However, clients who travel during the adjournment period will face complications returning to the U.S. For immigration purposes the criminal case is open during this period. Clients traveling within the adjournment period will be stopped by Customs and Border Protection (CBP) upon re-entry to the U.S. Generally, they will be placed in secondary inspection and questioned about the criminal case. All statements that they make will be recorded and may be used against them in future immigration interviews for benefits (such as an interview for naturalization) or during removal proceedings. Clients will be questioned without counsel present. **IDP advises strongly against travel during the adjournment period.**

Lawful permanent residents returning to the U.S. during the adjournment period will generally be “paroled” back into the U.S. and required to return to a CBP office to provide updates about the case. The client’s green card will be confiscated. Only after the client is able to show a Certificate of Disposition that includes a disposition which does not make the client removable (such as a dismissal) will they be considered to be legally “admitted” to the U.S., freed from obligations to report periodically to the CBP office, and regain possession of their green card. **Clients who are not lawful permanent residents and are considering traveling during the adjournment period need an individualized consultation.**

If a client has plans to travel during the adjournment period which cannot be delayed, they may benefit from a request that the court advance the case and dismiss and seal the case prior to travel. It is best practice for the criminal defense attorney to instruct the client to contact the criminal defense attorney before traveling during the adjournment period so the attorney may consider making this request. The attorney should ensure the client has their contact information. Once the ACD is dismissed, the client should be able to travel internationally without problems stemming from this case.

If the client travels shortly after the case is dismissed and sealed, you can advise the client to obtain the Certificate of Disposition and carry it with them while traveling. The client can present proof that the case was dismissed if they are stopped and asked about it upon return to the US.

Impact on immigration applications

Because an ACD does not ultimately result in a conviction for immigration purposes, the acceptance of an ACD alone will not make a client statutorily ineligible for immigration benefits in the future. Generally, we advise that clients wait until the adjournment period is over before submitting any immigration application, when possible. Clients must disclose the outcome of all arrests in immigration applications, including cases that were dismissed and sealed. Clients are generally required to include a Certificate of Disposition for every arrest and ticket that charged the client

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with a criminal offense when they submit an immigration application. Clients may be asked about this and any other arrests during an immigration interview. Clients who have had contacts with the criminal legal system, even if the result was a dismissed case, should consult with an immigration attorney **before** submitting any immigration application.

Impact on citizenship applications:

Lawful permanent residents are eligible for citizenship if they meet specific requirements. One of the eligibility requirements for citizenship is the applicant must demonstrate that they have "Good Moral Character" (GMC) during the five² years immediately prior to applying. Immigration will consider arrests and convictions within the GMC period in discretion, even if they do not make the client ineligible for citizenship. Clients considering applying for citizenship should consult with a knowledgeable immigration attorney about whether to wait for five years after the conclusion of this case before submitting an application.

Impact on other applications:

After the adjournment period is over, the dismissed case alone will not be a bar to any immigration benefit for which the client is otherwise eligible. However, the arrest may be considered in discretion in the context of the client's complete criminal and immigration history. Clients who have had contacts with the criminal legal system, even if the result was a dismissed case, should consult with an immigration attorney **before** submitting any immigration application. An immigration attorney can help the client determine the risk of submitting any application, put together the best supporting materials, and otherwise help ensure a successful application.

Impact on Current Removal Proceedings

Clients in removal (deportation) proceedings should not become statutorily ineligible for any relief from removal based on an ACD. However the arrest and ensuing open criminal case may have a negative impact on the removal case and the client's ability to remain out of immigration detention, depending on their criminal and immigration history. You can contact the client's immigration attorney or IDP for individualized advice about this case.

Special Considerations for Criminal Cases Raising Civil Rights Issues

Some clients want to pursue an outright dismissal or acquittal at trial, with the goal of engaging in civil litigation. Immigrant clients have the same rights to initiate civil lawsuits for police misconduct as clients who are U.S. citizens.³ If your client is considering a civil lawsuit, they need full and accurate advice about the potential immigration consequences of the criminal case. You can contact IDP for assistance providing advice in these circumstances.

² Lawful permanent residents eligible for citizenship based on marriage to a U.S. citizen spouse after three years must show three years of good moral character. INA 319(a), 8 USC 1430(a), INA 316(a), 8 USC 1020(a)

³ Claims made under Section 1983 apply to "any citizen of the United States or other person within the jurisdiction [of the United States....]" 42 U.S.C. § 1983.