

PROSECUTORIAL DISCRETION

What is Prosecutorial Discretion (“PD”)?

In certain situations, the Department of Homeland Security (“DHS”) decides not to detain, start deportation proceedings against, or physically remove certain non-citizens from the United States. This is called “prosecutorial discretion” (PD). The decision is based on priorities for deportation and the facts of a specific case. Non-citizens without criminal records and certain positive factors, such as close ties to the United States or a history of paying taxes, are more likely to be granted PD.

PD can take many forms but most commonly, DHS agrees to “administrative closure” or to “dismissal” of removal proceedings against a non-citizen.

What is Administrative Closure (“AC”)?

An immigration judge may administratively close a case if DHS and the person in removal proceedings both request it. When a case is administratively closed, it is removed from the court’s calendar indefinitely and no future hearings are scheduled. AC does **not** mean the case is over; it just means that no future hearing is scheduled. The case can be reopened at any time at the request of DHS or the person in proceedings. **For this reason, even though a case is administratively closed, the non-citizen must continue to notify the immigration court and DHS of address changes by filing form EOIR-33 within 5 days of the move. Failure to do so may result in a removal order if a court hearing is rescheduled and the non-citizen does not get the notification because of a change of address.**

The Benefits of Administrative Closure

Some of the benefits include, but are not limited to:

- The threat of deportation is eliminated while a case is administratively closed;
- If relief from removal (asylum, for example) is not likely to be granted, AC can delay a final order of deportation;
- If eligible for employment authorization prior to AC, a non-citizen may continue to renew the work permit in certain situations;
- The non-citizen can continue to strengthen ties to the United States while the case is closed. This may help in seeking certain relief from removal at a later time;
- AC can allow applications filed with other immigration agencies, such as United States Citizenship and Immigration Service (“USCIS”), to be processed without having to worry about immigration court hearings.

The Risks and Downsides of Administrative Closure

Some of the risks and downsides include, but are not limited to:

- AC, on its own, does not grant any immigration status or benefits;
- AC is not permanent. DHS may seek to put the case on the calendar for an immigration court hearing at any time;

- Non-citizens cannot travel abroad while removal proceedings are administratively closed;
- Changes in an immigrant’s home country while a case is administratively closed may weaken an asylum application;
- The memory of witnesses may fade and evidence may become stale while a case is administratively closed.

Dismissal/Termination. At this time, in an effort to clear the immigration court docket of cases that are considered low enforcement priority, DHS may request and the immigration judges may agree to dismiss or terminate the removal proceeding, unless you decide to keep your case open and pursue relief from removal. When a removal proceeding is terminated or dismissed it means the removal case is over and you no longer need to appear in immigration court. However, it is possible that at some point in the future, DHS will initiate new removal proceedings against you.

The Benefits of Dismissal/Termination

Some of the benefits include, but are not limited to:

- You will not be ordered deported;
- If there is a low likelihood of success in removal proceedings, dismissal will avoid a denial, which usually results in an order of removal;
- Depending on the circumstances of your case, you may be able to pursue an immigration benefit before a different immigration agency, such as the US Citizenship and Immigration Service (USCIS).

The Risks and Downsides of Dismissal/Termination

Some of the risks and downsides include, but are not limited to:

- Dismissal/termination, on its own, does not grant any immigration status;
- Unless you are seeking immigration status before another agency, you will not be eligible to apply for work authorization or travel document;
- If you had a pending asylum claim before the immigration court, it will also be dismissed, with limited possibility of filing that claim affirmatively with USCIS;
 - If you file for asylum affirmatively with USCIS, this may be considered a newly-filed asylum application and you may have to wait 150 days after filing to apply for work authorization;
 - If you had derivatives on your defensive asylum application who turned – or are about to turn – 21 years old, they may age out/have aged out for purposes of filing an affirmative application;
- If you had a pending application for an immigration benefit before the immigration court, it will also be dismissed and you will start, or resume, accruing unlawful presence, which will pose problems if you seek to adjust status or consular process in the future;
- If you are in “withholding-only” proceedings pursuant to a reinstated removal order, dismissing the proceedings will leave the removal order against you. If ICE decides not to enforce the removal order, you will be eligible for work authorization. However, ICE may decide at any point to remove you from the US.

- If you had a pending Cancellation of Removal case (for permanent residents or non-permanent residents), once it is dismissed it cannot be affirmatively filed at a later date, as this form of relief is only possible before Immigration Court.

These lists of risks and benefits are not exhaustive. Many other factors specific to each case must be considered. For some people, PD may be the best possible outcome for their case; for others, it may not be a good choice. The decision to accept PD should be made after consultation with an experienced immigration attorney.