**U.S. Department of Justice**

Executive Office for Immigration Review

*Board of Immigration Appeals*
*Office of the Clerk*

*5107 Leesburg Pike, Suite 2000*
*Falls Church, Virginia 22041*

**Pratt, John P., Esquire**
**2650 S. W. 27th Avenue 2nd Floor**
**Miami, FL 33133-0000**

**Office of the Chief Counsel/MIA**
**333 South Miami Ave., Suite 200**
**Miami, FL 33130**

**Name:** [redacted] **A** [redacted]

**Date of this notice: 10/24/2005**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F.F.K.

Frank Krider
Chief Clerk

Enclosure

Panel Members:
FILPPU, LAURI S.
OSUNA, JUAN P.
PAULEY, ROGER

File: A[redacted] - Miami

Date:

OCT 2 4 2005

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John P. Pratt, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] - Crime involving moral turpitude

APPLICATION: Section 212(h) waiver of inadmissibility

The respondent has appealed from the Immigration Judge's April 28, 2004, decision finding him ineligible for a waiver of inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h), as well as voluntary departure under section 240B(b) of the Act, 8 U.S.C. § 1229c(b). The appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings.

The record reflects that the respondent, a native and citizen of Israel, was admitted to the United States in October 1990 and adjusted his status to lawful permanent resident in December 1996 (Exh. 4). Subsequently, the respondent was convicted under Florida law of burglary of an unoccupied dwelling on March 25, 1998, and sentenced to 2 years of probation (Exh. 2). Based on this conviction, the Department of Homeland Security (the DHS, formerly the Immigration and Naturalization Service) initiated removal proceedings, serving the respondent with a Notice to Appear on October 10, 2003.

The first issue on appeal is whether the Immigration Judge erred in finding the respondent ineligible for a waiver under section 212(h) of the Act because he failed to establish the requisite continuous lawful residence. Section 212(h) provides that:

> No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings.

The Immigration Judge interpreted the statute to require the respondent to establish 7 years of continuous residence as a lawful permanent resident in order to be eligible for a waiver (I.J. at 6-7).

We disagree with that interpretation. Like the respondent, we read the statute to require 7 years of continuous residence in *any* lawful status.[1] The respondent's lawful residence in the United States commenced in 1990 when he was admitted as a nonimmigrant. Because there is no indication that he ever lost his lawful status, we conclude that the respondent has met the residency requirement for a section 212(h) waiver of inadmissibility.

The second issue is whether the Immigration Judge correctly determined that the respondent was ineligible for voluntary departure as an arriving alien (I.J. at 8). Again, we find the Immigration Judge's reading of the statute to be in error. Although arriving aliens are ineligible for voluntary departure under section 240B(a) of the Act, there is no such bar under section 240B(b) for voluntary departure at the conclusion of proceedings. *See* section 240B(b) of the Act; *see also Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999).

We conclude that the respondent has demonstrated prima facie eligibility to apply for both a waiver of inadmissibility under section 212(h) and for voluntary departure under section 240B(b) of the Act. Accordingly, we will enter the following orders.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[1] While the phrase "since the date of such admission," which refers to the date of admission as a lawful permanent resident, somewhat confuses matters, we read it to modify only the first clause following the word "either," which relates to the aggravated felony bar, and not to the clause following the word "or," which addresses the continuous residence requirement.