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U. S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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Date: **JAN 11 2012**

Office: MANILA, PHILIPPINES

FILE: 

IN RE:

Applicant: 

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The application for waiver of inadmissibility was denied by the Director, Manila, Philippines, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant is applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h) in order to reside in the United States.

The director determined that the applicant is statutorily ineligible for a waiver of inadmissibility, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Denial Notice*, dated June 8, 2009.

On appeal, the applicant asserts that he is eligible for a waiver under section 212(h)(1)(A) of the Act. *Form I-290B Supplement*, dated June 30, 2009.

The record includes, but is not limited to, statements from the applicant, the applicant's conviction records, and an approved petition for alien relative (Form I-130) filed on behalf of the applicant. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime,

the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The record reflects that in or around 1982, the applicant was convicted in the Regional Trial Court, Branch 56, Angeles, Pampanga, Philippines, of frustrated homicide, in violation of Articles 249 and 6 of the Revised Penal Code of the Philippines. The applicant was granted probation and he was discharged from probation on June 27, 1984. *Certificate*, dated August 22, 1988.

Article 249 of the Revised Penal Code of the Philippines provides, in pertinent part:

Any person who, not falling within the provisions of article 246 shall kill another without the attendance of any of the circumstances enumerated in the next preceding article, shall be deemed guilty of homicide and be punished by *reclusion temporal*.

Article 6 of the Revised Penal Code of the Philippines provides, in pertinent part:

Consummated felonies, as well as those which are frustrated and attempted, are punishable. A felony is consummated when all the elements necessary for its execution and accomplishment are present; and it is frustrated when the offender performs all the acts of execution which would produce the felony as a consequence but, which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator.

Article 249 of the Revised Penal Code of the Philippines is violated when the perpetrator has the "intent to kill." In *People v. Montemayor*, CA-G.R. No. 02312-R, July 9, 1965, the court determined that where the intent to kill is not manifest, the crime is not attempted or frustrated murder or homicide. In *People v. Castillo*, 76 Phil. 27, the court determined that the element of intent to kill in frustrated homicide is incompatible with negligence or imprudence.

Black's Law Dictionary, Sixth Edition, defines *murder* under American and English jurisprudence as the "unlawful killing of a human being by another with malice aforethought, either express or implied." (citing *Com. v. Carroll*, 194 A.2d 911, 914). Model Penal Code § 210.2 provides, "Criminal homicide constitutes murder when: (a) it is committed purposely or knowingly; or (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." Black's Law Dictionary, Sixth Edition, defines attempt under criminal law as the "intent to commit a crime coupled with an act taken toward committing the offense." Accordingly, the AAO finds that the applicant's conviction for frustrated homicide is akin to attempted murder.

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules

of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

It is well established that murder is a crime that is inherently base, vile or depraved, and thus, involves moral turpitude. *See Matter of Lopez*, 13 I&N Dec. 725, 726 (BIA 1971)(explaining, “voluntary manslaughter involves moral turpitude, although involuntary manslaughter does not.”). In *Matter of Awaijane*, the BIA noted that, “There is no distinction for immigration purposes in respect to moral turpitude, between the commission of the substantive crime and the attempt to commit it.” 14 I&N Dec. 117, 118 (BIA 1972)(citations omitted). The BIA in *Awaijane* found that the respondent’s convicted for attempted murder constituted a crime involving moral turpitude. *Id.* Accordingly, the AAO finds that the applicant’s conviction for frustrated homicide is a crime involving moral turpitude, and he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Section 212(h) of the Act provides, in pertinent parts:

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . ; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions

and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture.

Pursuant to section 212(h) of the Act, there is no waiver available to an alien who is inadmissible under section 212(a)(2)(A) of the Act for having been convicted of murder, or who has been convicted of an attempt or conspiracy to commit murder. Here, the applicant has been convicted of frustrated homicide. "Frustrated" under the Revised Penal Code of the Philippines is defined as when the "offender performs all the acts of execution which would produce the felony as a consequence but, which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator." "Homicide" under the Revised Penal Code of the Philippines includes as an element the "intent to kill" another individual. The applicant's crime is thus akin to attempted murder, and the ineligibility provision of section 212(h)(2) is applicable in his case. Since the applicant does not qualify for a section 212(h) waiver, his inadmissibility under section 212(a)(2)(A)(i)(I) cannot be waived, and the appeal must be dismissed.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.