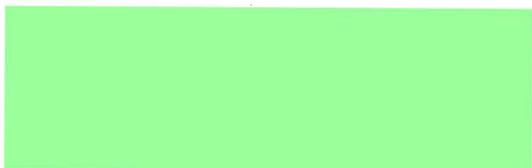


(b)(6)

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

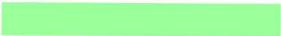


U.S. Citizenship
and Immigration
Services



DATE: **JUN 19 2013** Office: MANILA, PHILIPPINES

FILE: 

IN RE: Applicant: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** 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,

A handwritten signature in black ink that reads "Michael Shumway".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Manila, Philippines, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The applicant is a 70-year-old native and citizen of the Philippines found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), as an alien convicted of a crime involving moral turpitude. The applicant is the spouse of a lawful permanent resident and the father of an adult U.S. citizen. He presently seeks a waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), in conjunction with an immigrant visa application, in order to obtain admission to the United States to reside with his wife and daughter.

The acting director concluded that the applicant's conviction in the Philippines is the equivalent of second degree murder in the United States, and thus, statutorily barred his application for a waiver under section 212(h) of the Act. *Acting Field Office Director's Decision*, dated October 19, 2009. He denied the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, counsel¹ asserts that the acting director erred in finding that the applicant's conviction is the equivalent of second-degree murder in the United States, and contends that the applicant is statutorily eligible for a section 212(h) waiver. *See Appeal Brief*, dated December 16, 2009. Further, she asserts that the applicant has demonstrated eligibility for the waiver both under the rehabilitation provisions of section 212(h)(1)(A) of the Act, and the extreme hardship provisions of section 212(h)(1)(B) of the Act.

The record of evidence includes, but is not limited to, counsel's briefs; statements of the applicant's lawful permanent resident wife and U.S. citizen daughter; statements of the applicant's other children, neighbors, and business partner; the applicant's medical records; and the applicant's foreign criminal records. The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record was reviewed and all relevant evidence considered in reaching 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.

¹ The applicant was represented on the appeal by [REDACTED]. In correspondence dated May 2, 2003, Ms. [REDACTED] states that her representation has been terminated.

The record indicates that the applicant presently resides in the Philippines and is the beneficiary of a Form I-130, Petition for Alien Relative, filed by his U.S. citizen daughter. The record discloses that the applicant was convicted of two related crimes in the Philippines. He was convicted of serious physical injuries in violation of article 263 of the Revised Penal Code of the Philippines (RPC) and frustrated homicide in violation of articles 249 and 6 of the RPC on August 30, 1974. The applicant was sentenced to an indeterminate term of imprisonment ranging from a minimum of two months and one day to a maximum of one year and one day for the crime of serious physical injuries. For the crime of frustrated homicide, the applicant was sentenced to an indeterminate term of imprisonment ranging from a minimum of two years, four months, and one day to a maximum of eight years and one day. His term of imprisonment for the crimes in the aggregate was a minimum of two years, six months, and two days to a maximum of nine years and two days. The record indicates that he was discharged early from prison on or about July 1, 1975. *See Certificate of Discharge from Prison*, dated July 1975; *Letter from the Philippines' National Bureau of Investigations*, dated September 18, 2008.

Based on the foregoing convictions, the acting director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of crimes involving moral turpitude. As the applicant does not dispute inadmissibility on appeal, and the record does not show the finding to be erroneous, we will not disturb the determination of inadmissibility. However, counsel disputes the acting director's conclusion that the applicant's conviction for frustrated homicide is the equivalent of murder in the United States, rendering him statutorily ineligible for a waiver under section 212(h) of the Act.

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

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . 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. No waiver shall be provide 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 to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

(emphasis added). The language of section 212(h) of the Act specifically provides that a waiver under that section is unavailable to an applicant who has been convicted of murder, or an attempt or conspiracy to commit murder. After analyzing both Philippine and U.S. laws, the acting director concluded that a homicide conviction in the Philippines is equivalent to a second-degree murder conviction in the United States, on the basis that both crimes have intent to kill as an element of the offense and that a crime involving specific intent to kill constitutes murder under U.S. laws. *Acting Field Office Director's Decision*, at 6. The acting director further found that the foreign homicide offense is not the equivalent of manslaughter² in the United States (a crime which would not render the applicant statutorily ineligible for a section 212(h) waiver), because the latter does not require an intent to kill as an element. *See id.* As such, the applicant was deemed statutorily ineligible for a section 212(h) waiver for having been convicted of murder.

As noted, counsel contends that the acting director erred in determining that homicide in the Philippines is akin to second-degree murder in the United States. She asserts that, contrary to that finding, both murder and *voluntary* manslaughter require the element of intent under American jurisprudence. Therefore, she contends that the acting director impermissibly relied upon the presence of the element of "intent to kill," as determinative of whether frustrated homicide equates to murder rather than voluntary manslaughter in the United States.

² The acting director did not distinguish between voluntary and involuntary manslaughter in the analysis.

1. Murder and Voluntary Manslaughter in the United States

The AAO has reviewed various sources of law for the definition of murder in the United States, including common law, state law and federal law. See *Matter of M-W-*, 25 I&N Dec. 748, 749–56 (BIA 2012). Under common law, murder is defined as the “killing of a human being with malice aforethought.” *Id.* at 752 (citing *Black’s Law Dictionary* 1043 (8th ed. 2004)). States have defined and structured murder in degrees. “[F]irst-degree murder is characterized by conduct that is ‘willful, deliberate, or premeditated,’ such as murder ‘by poisoning or by lying in wait.’” *Matter of M-W-*, 25 I&N Dec. at 752. Second-degree murder includes “[a]ll other types of murder” and is “a lesser degree of murder.” *Id.* The federal statutory definition of murder is largely the same:

Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

Id. (alteration in original) (quoting 18 U.S.C. § 1111(a)).

Under the common law, voluntary or intentional manslaughter is defined as “[a]n act of murder reduced to manslaughter because of extenuating circumstances such as adequate provocation . . . or diminished capacity.” *Black’s Law Dictionary* (9th ed. 2009). The federal statute similarly provides voluntary manslaughter is “the unlawful killing of a human being without malice,” which occurs “[u]pon a sudden quarrel or heat of passion.” 18 U.S.C. § 1112. The U.S. Court of Appeals for the Fifth Circuit has noted that “voluntary manslaughter emerged as an *intentional* killing that is nonetheless deemed to be without malice because it occurs in what the courts called ‘the heat of passion.’” *U.S. v. Browner*, 889 F.2d 549, 552 (5th Cir. 1989) (emphasis added).

Malice aforethought, also termed premeditated or preconceived malice under common law, is defined as “[t]he requisite mental state for [] murder, encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called ‘abandoned and malignant heart’), or (4) the intent to commit a dangerous felony (which leads to culpability under the felony-murder rule). See *Black’s Law Dictionary* (9th ed. 2009); see also *Matter of M-W-*, 25 I&N Dec. at 753 (noting the same under the federal murder statute at 18 U.S.C. § 1111(a)); see *United States v. Pineda-Doval*, 614 F.3d 1019, 1038 (9th Cir. 2010) (Stating that the concept of malice aforethought can be said

to have expanded to cover “four different kinds of *mental states*: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless indifference); and (4) intent to commit a felony.) (emphasis added). Each of these mental states constitutes or establishes malice. *See Browner*, 889 F.2d at 551-52.

The Board of Immigration Appeals (Board or BIA) has stated that malice aforethought distinguishes murder from manslaughter under common law and was essential to both first and second-degree murder. *Matter of M-W-*, 25 I&N Dec. at 753. However, as the Fifth Circuit has clarified, although “voluntary manslaughter is defined as a killing without malice, it nevertheless includes the element of malice *negated* by the existence of a ‘sudden quarrel or heat of passion.’” *U.S. v. Moore*, 2013 WL 512342, at *5 (5th Cir. Feb. 11, 2013) (emphasis added); *see also Browner*, 889 F.2d at 552 (noting that under the federal definition of voluntary manslaughter, when the accused, “without legal justification but ‘actuated by sudden passion of fear or rage arising from attendant circumstances that would provoke such passion in an ordinary person, kills intentionally (or with one of the other mental states that constitutes malice), the killing is nevertheless deemed to be in the *absence of malice.*’”)(emphasis added); *see also U.S. v. Scafe*, 822 F.2d 928, 932 (10th Cir. 1987) (“Malice is negated by the heat of passion.”). Thus, where the accused has killed with the requisite mental state for murder (i.e., intent to kill or recklessness with extreme disregard for human life), “but the killing occurred in the ‘heat of passion’ caused by adequate provocation,” he or she is actually guilty of voluntary manslaughter. *U.S. v. Paul*, 37 F.3d 496, 499 (9th Cir. 1994). A finding of heat of passion and adequate provocation negates the malice that would otherwise attach. *See id.*

In contrast, involuntary manslaughter is defined as “[h]omicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony-murder rule.” *Black’s Law Dictionary* (9th ed. 2009); *Paul*, 37 F.3d at 499 (“[I]nvoluntary manslaughter is an unintentional killing that ‘evinces a wanton or reckless disregard for human life but is not of the extreme nature that will support a finding of malice’”).

Lastly, we note that federal law also penalizes an attempt to commit murder or manslaughter under section 1113 of title 18 of the United States Code.

2. Unlawful killings in the Philippines

In the Philippines, killings that incur criminal liability are called “unlawful killings,” and are categorized as parricide, infanticide, murder, or homicide under the Revised Penal Code of the Philippines. *See* Articles 246, 248–49 & 255 of the RPC, Act No. 3815 (Phil.). Parricide is the killing of one’s father, mother, child, ascendants, descendants, or spouse, and it is “punished by the penalty of reclusion perpetua to death.” RPC art. 246.

Infanticide is the “kill[ing of] any child less than three days of age,” and it is punished by the same penalty imposed for parricide or murder. RPC art. 255.

Murder is the unlawful killing of any nonrelative “if committed with any of the following attendant circumstances:”

1. With treachery, taking advantage of superior strength, with the aid of armed men, or employing means to weaken the defense or of means or persons to insure or afford impunity.
2. In consideration of a price, reward, or promise.
3. By means of inundation, fire, poison, explosion, shipwreck, stranding of a vessel, derailment or assault upon a street car or locomotive, fall of an airship, by means of motor vehicles, or with the use of any other means involving great waste and ruin.
4. On occasion of any of the calamities enumerated in the preceding paragraph, or of an earthquake, eruption of a volcano, destructive cyclone, epidemic or other public calamity.
5. With evident premeditation.
6. With cruelty, by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse.

RPC art. 248. Murder is “punished by reclusion temporal in its maximum period to death.” *Id.*

Homicide is the unlawful killing of any nonrelative “without the attendance of any of the circumstances enumerated” under murder, and it is punished by “reclusion temporal.” RPC art. 249. Essentially, homicide is any unlawful killing other than parricide, infanticide, or murder. *See 2 Luis B. Reyes, The Revised Penal Code: Criminal Law 476 (16th ed. 2006) (Phil.).*

We note that felonies under the RPC are classified in one of three ways: consummated, frustrated, or attempted. A consummated felony means “all the elements necessary for its execution and accomplishment are present.” RPC art. 6. A frustrated felony is one where “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.” *Id.* An attempted felony means “the offender commences the commission of a felony directly or over acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than this own spontaneous desistance.” *Id.* Frustrated homicide, then, is the unlawful killing of any nonrelative, which is unconsummated, even though the offender performs all the acts for its consummation, and which does not involve one of the six circumstances listed under Article 248 of the RPC that would otherwise qualify the crime as murder.

Our review of the Revised Penal Code and the Philippines jurisprudence reveals that although “intent” is not set forth as a statutory element of either murder or homicide, it is a requisite element of both offenses. An individual incurs criminal liability under the RPC in the Philippines when he or she commits a felony by committing an act or an omission by means of deceit (*dolo*) or by means of fault (*culpa*). See RPC art 3. The RPC states that there is deceit when the act is performed with deliberate intent. See *id.* The Supreme Court of the Philippines has held that intent is an essential element of homicide. See *People v. Badriago*, G.R. No. 183566 (S.C. May 8, 2009) (Phil.) (“To successfully prosecute the crime of homicide, the following elements must be proved beyond reasonable doubt: (1) that a person was killed; (2) that the accused killed that person without any justifying circumstance; (3) that the accused had the *intention to kill*, which is presumed; and (4) that the killing was not attended by any of the qualifying circumstances of murder, or by that of parricide or infanticide.”)(emphasis added)³; *Nerpio v. People*, G.R. No. 155153 (S.C., July 24, 2007) (Phil.)⁴; *Adame v. Hon. Court of Appeals*, G.R. No. 139830 (S.C., Nov. 21, 2002) (Phil.) (“A conviction for frustrated homicide requires proof of intent to kill.”)⁵; *Salvador Yapyuco y Enriquez v. People*, G.R. No.120744-46 (S.C., June 25, 2012) (Phil.) (“[T]here can be no frustrated homicide through reckless negligence inasmuch as reckless negligence implies lack of intent to kill, and without intent to kill the crime of frustrated homicide cannot exist.”)⁶; see *Mondragon v. People*, G.R. No. L-17666 (S.C., June 30, 1966) (Phil.) (As intent to kill is an essential element of the offense of frustrated homicide such that it must be proved by clear and convincing evidence)⁷.

However, “*dolo*” or deceit under article 3 of the RPC encompasses more than “deliberate intent” and is also defined or interpreted under the Philippines jurisprudence as “malice.” See *People v. Daniel Quijada Y Circulado*, G.R. Nos. 115008-09 (S.C., July 24, 1996) (Phil.)⁸; see also 1 Luis B. Reyes, *The Revised Penal Code: Criminal Law* 61 (16th ed. 2006) (Phil.) (defining “with deceit” under Article 3 of the RPC as “with malice.”). Accordingly, murder and homicide are acknowledged by the Supreme Court of the Philippines as *mala in se* offenses “because “malice or *dolo* is a necessary ingredient” of the offenses. See *People v. Daniel Quijada y Circulado, supra*. In other words, they are offenses that are considered “inherently immoral.” See *Black's Law Dictionary* (9th ed. 2009) (noting the term *malum in se* (singular form) as Latin for “evil in itself” and defining it as a “crime or an act that is inherently immoral, such as murder, arson, or rape.”); see also Elmer P. Brabrante, *Criminal Law Reviewer for the 2011 Bar Examinations 2* (Phil.) (“Violations of the Revised Penal Code are referred to as *malum in se*, which literally means, that the act is inherently evil or bad or per se wrongful.”)⁹.

³ Available at http://www.lawphil.net/judjuris/juri2009/may2009/gr_183566_2009.html

⁴ Available at http://www.lawphil.net/judjuris/juri2007/jul2007/gr_155153_2007.html

⁵ Available at http://www.lawphil.net/judjuris/juri2002/nov2002/gr_139830_2002.html

⁶ Available at http://www.lawphil.net/judjuris/juri2012/jun2012/gr_120744_2012.html

⁷ Available at http://www.lawphil.net/judjuris/juri1966/jun1966/gr_1-17666_1966.html

⁸ Available at http://www.lawphil.net/judjuris/juri1996/jul1996/gr_115008_09_1996.html

⁹ Available at <http://mclaw08.files.wordpress.com/2011/07/criminal-law-review.pdf>

3. *Whether Frustrated Homicide is Equivalent to Murder or Voluntary Manslaughter in the United States*

We do not decide today whether homicide in the Philippines specifically equates to second-degree murder, as found by the acting director. We need only decide whether the applicant's frustrated homicide conviction constitutes "an attempt or conspiracy to commit murder" under section 212(h)(2) of the Act. We acknowledge that the AAO has found frustrated homicide under Philippine law to be the equivalent of attempted murder in an unpublished decision. *See* Matter of ___, 2011 WL 7068470, at *2 (AAO, Apr. 13, 2011). In that decision, however, we did not discuss the specific circumstances underlying the conviction, or do the in-depth analysis we do today.

Relying upon American jurisprudence, which addressed the general offense of manslaughter, the acting director determined that manslaughter did not involve intent to kill, without distinguishing between voluntary and involuntary manslaughter. Accordingly, the acting director held that manslaughter was not akin to homicide in the Philippines, which involved an intentional killing, much like murder in the United States. This is incorrect. As counsel contends, while involuntary manslaughter is not an intentional crime, both murder and voluntary manslaughter are under U.S. federal laws, as is homicide in the Philippines. *See Moore*, 2013 WL 512342, at *5 (5th Cir. Feb. 11, 2013) (emphasis added); *see also Browner*, 889 F.2d at 552. Thus, the element of intent alone is not determinative of whether homicide in the Philippines equates to murder in the United States.

Counsel further asserts that murder and voluntary manslaughter are distinct crimes based on the presence or absence of mitigating factors such as provocation or "heat of passion," rather than the element of intent. *See Counsel's Appeal Brief*, at 6-7. Counsel cites American jurisprudence, section 210 of the Model Penal Code, and state case law, in support of the proposition that "provocation" is the distinction between voluntary manslaughter and murder. *See id.* at 7. Counsel contends that one must look to the mental state, or *mens rea*, of the accused at the time the crime is committed to determine whether he or she acted with provocation, or "in a heat of passion." *See id.* at 8. She asserts, however, that in the Philippines, there is no such inquiry and that all intentional killings that fall into the category of homicides are classified the same, regardless of provocation or malice. *See id.* Counsel contends that because neither the trial or appellate courts in the applicant's criminal case made any inquiry into his mental state or his motive to commit the alleged homicide, it is impossible to determine from the record whether the crime for which the applicant was convicted was committed with malice or whether it was committed as a result of provocation, self-defense or in the heat of passion. *See id.* The resulting ambiguity, counsel contends, must be resolved in the applicant's favor.

The AAO, as noted, concurs in part with counsel's contentions and agrees that voluntary manslaughter is an unlawful, intentional killing, as is murder in the United States. Thus, we conclude that the fact that frustrated homicide in the Philippines is also an intentional killing (which however is not consummated) is by itself an insufficient basis to conclude that it is equivalent to murder in the United States. We also agree that provocation and "heat of passion"

are the distinguishing factors between murder and voluntary manslaughter in the United States. *See Paul*, 37 F.3d at 499; *Moore*, 2013 WL 512342, at *5; *Browner*, 889 F.2d at 552.

The AAO disagrees, however, with counsel's assertion that the applicant's conviction did not involve any inquiry into his mental state. To the contrary, as indicated in our discussion of Philippine jurisprudence herein, one incurs criminal liability for the crime of murder and homicide in the Philippines when the unlawful killing is committed with *dolo*, meaning with malice. RPC art. 3. Malice is interpreted nearly identical to its meaning under U.S. laws and is the relevant mental state for the offense of homicide under the RPC. *See People v. Daniel Quijada y Circulado, supra; see, e.g., Pineda-Doval*, 614 F.3d at 1038 (“[M]alice aforethought covers four kinds of mental states: (1) intent to kill; (2) intent to do serious bodily injury; (3) depraved heart (i.e., reckless indifference); and (4) intent to commit a felony”). As such, looking just to the statutory elements of the offense, a conviction for frustrated homicide would necessarily entail an inquiry into the applicant's mental state and a determination that the accused committed the unlawful act with malice. This would be sufficient to demonstrate that a frustrated homicide conviction equates to murder in the United States, absent any indication in the conviction record that there was provocation or other factors that negate the malice.

We recognize that the Philippines' Revised Penal Code does not criminalize as a separate offense conduct that equates to voluntary manslaughter in the United States, where the intent or malice behind the unlawful killing is negated by mitigating factors such as provocation. This therefore raises the possibility that homicide in the Philippines may encompass homicides that would be the equivalent of voluntary manslaughter. However, the RPC sets forth what are termed aggravating and mitigating circumstances, which the courts consider in the penalty phase of criminal proceedings. Specifically, Philippine courts have authority to further reduce or increase the criminal penalty for a particular offense after examining the circumstances of the case for consideration of any mitigating or aggravating factors that may be present. RPC arts. 13, 14 & 62. Mitigating circumstances under the RPC include those where the accused: (1) “had no intention to commit so grave a wrong as that committed”; (2) had “sufficient provocation or threat on the part of the offended party [that] immediately preceded the act”; or (3) had “acted upon an impulse so powerful as naturally to have produced passion or obfuscation.” RPC art. 13. We observe that some of the mitigating factors set forth in the penal code are not dissimilar to the provocation or “heat of passion” that negates the malice element of murder to reduce the offense to voluntary manslaughter in the United States. As the criminal court makes the determination as to whether there are any mitigating or aggravating circumstances, we look to the record of conviction to determine whether any such determination was made in the instant case. *See generally* RPC arts. 62-71.

The conviction records the applicant has proffered include a Certificate of Discharge from Prison and the appellate decision in his case issued by the Court of Appeals in Manila, Philippines. The record does not contain the criminal information. However, the appellate decision sets forth the charges from the information. The decision also sets forth the sentencing determinations of the trial judge, after having found the applicant guilty of the crimes of frustrated homicide and serious physical injuries. We note that the sentencing determinations specifically indicate that

there were “no modifying circumstances” in the applicant’s case. This is significant as our review of decisions issued by the Supreme Court of the Philippines indicate that the modifying circumstances referenced relates to the aggravating or mitigating circumstances of Articles 13 and 14 of the RPC that are to be considered in determining the appropriate sentence or penalty. *See, e.g., People v. Hon. Kayanan and Hon. Agana*, Gr. No. L-30355 (S.C., May 31, 1978) (Phil.), (successful challenge by the prosecution of the trial judge’s actions in allowing accused to plead guilty to lower offense of homicide and be credited with the mitigating circumstances of voluntary surrender and incomplete self-defense, without requiring said circumstances to be proven by evidence)¹⁰; *People v. Nonceto Gravino*, G.R. No. L-31327-29 (S.C., May 16, 1983) (Phil.)(sentencing portion of court decision includes the following: the accused “is hereby pronounced guilty of Homicide, with two mitigating circumstances ... and two aggravating circumstances. . . .”)¹¹; *Serrano y Cervantes v. People*, G.R. No. 175023 (S.C., July 5, 2010) (Phil.), (example of the application of the rules set forth in the RPC in determining the appropriate penalty during the sentencing phase, including addressing the presence or absence of modifying circumstances)¹²; *People v. German G. Lee*, GR. No. L-66859 (S.C., September 12, 1984) (Phil.)(modifying judgment/sentence of the trial judge who made a sentence determination for a homicide conviction after finding two mitigating circumstances (provocation and voluntary surrender) and no aggravating ones)¹³.

The Philippine Supreme Court has held that the mitigating circumstances of passion and obfuscation require: “(1) that there be an act both unlawful and sufficient to produce such condition of mind; and (2) that said act which produces the obfuscation was not far removed from the commission of the crime by a considerable length of time, during which the perpetrator might recover his normal equanimity.” *See People v. Nonceto Gravino, supra; see also People v. Hon. Kayanan and Hon. Agana, supra* (noting the burden accused bears in demonstrating mitigating circumstances). Thus, much like defendants in the United States, the accused in the Philippines may present evidence of mitigating circumstances, such as provocation. In the instant case, although the applicant raised various defenses, including alibi, innocence, and confession by a third party, all of which were rejected both at the trial level and on appeal, there is no indication he ever asserted any mitigating circumstances, at trial or on appeal. Moreover, based on the language of the sentencing portion of the court’s decision, it appears that the trial judge specifically found that no mitigating, or aggravating, circumstances existed in his case. Thus, contrary to counsel’s assertion, there does not appear to be any ambiguity as to whether there were any provoking circumstances underlying his conviction for frustrated homicide.

In proceedings seeking a waiver of inadmissibility under section 212(h) of the Act, the applicant bears the burden of proving eligibility. *See* section 291 of the Act. After careful review of the applicant’s criminal records, the AAO is unable to conclude that the applicant has met his

¹⁰ Available at http://www.lawphil.net/judjuris/juri1978/may1978/gr_30355_1978.html

¹¹ Available at http://www.lawphil.net/judjuris/juri1983/may1983/gr_1_31327_29_1983.html

¹² Available at http://www.lawphil.net/judjuris/juri2010/jul2010/gr_175023_2010.html

¹³ Available at http://www.lawphil.net/judjuris/juri1984/sep1984/gr_166859_1984.html

burden. He has failed to show that the crime of frustrated homicide for which he was convicted, was committed as a result of provocation, in the heat of passion, or due to other mitigating circumstances, which would negate the malice or intent that was found by the criminal court. Thus, based on the applicant's conviction records and applicable laws, we find that the applicant's frustrated homicide conviction is the equivalent of attempted murder in the United States, in that it is an attempted intentional killing committed with malice and absent any mitigating circumstances, such as provocation or heat of passion. He therefore is statutorily ineligible for the waiver of inadmissibility that he requires under section 212(h) of the Act.

As the applicant has failed to demonstrate that mitigating circumstances, such as heat of passion or provocation, were involved in his conviction for frustrated homicide in the Philippines, we do not decide here whether the presence of such mitigating circumstances would necessarily reduce and equate the offense to attempted voluntary manslaughter in the United States, instead of attempted murder.

In proceedings for a waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. 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.