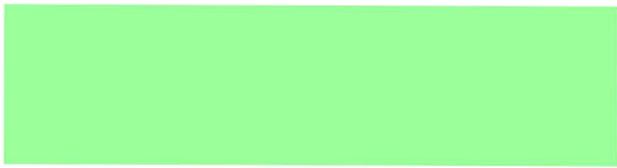




U.S. Citizenship
and Immigration
Services

(b)(6)



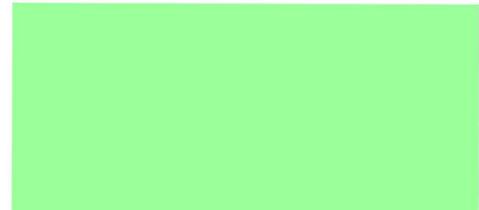
Date: **JUN 19 2013** Office: MANILA, PHILIPPINES

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:



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 in accordance with the instructions on 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 any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The applicant is a 64-year-old 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 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 daughter.

The Field Office Director concluded that the applicant's conviction for frustrated homicide in the Philippines is the equivalent of voluntary manslaughter in the United States, rendering him inadmissible for having been convicted of a crime involving moral turpitude. *See Field Office Director's Decision*, dated May 17, 2010. The director further concluded that the applicant's waiver application under section 212(h) of the Act was subject to the heightened discretionary standard of 8 C.F.R. § 212.7(d) because his conviction constituted a violent or dangerous crime. Having found that the applicant had failed to meet that heightened standard, the director denied the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, counsel disputes the finding of inadmissibility. Counsel asserts that the applicant's absolute pardon by the President of the Philippines essentially expunged his criminal conviction such that he is not inadmissible to the United States for having committed a crime involving moral turpitude. He further contends that frustrated homicide in the Philippines does not involve moral turpitude under Philippine law, which should apply. Lastly, counsel contends that 8 C.F.R. § 212.7(d) should not apply in the applicant's case.

The record of evidence includes, but is not limited to, counsel's briefs; the applicant's statements; the applicant's police clearances; character references; 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.

For the reasons set forth in this decision, we find that the applicant is ineligible for a waiver of inadmissibility under section 212(h) of the Act.

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 –

(b)(6)

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

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 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 originally convicted of frustrated murder, qualified by the circumstance of treachery, pursuant to articles 248 and 6 of the Revised Penal Code (RPC). The record indicates that the criminal offense was committed on November 24, 1968. On August 9, 1978, the Court of Appeals in Manila found that the applicant's offense did not involve treachery, and thus, constituted only frustrated homicide in violation of articles 249 and 6 of the RPC, rather than frustrated murder as had been found by the trial court. The applicant was sentenced to an indeterminate term of imprisonment ranging from a minimum of two years, four months and one day *prision correccional* to a maximum of eight years and one day *prision mayor* for the crime. On June 8, 2009, he was granted an absolute pardon by the President of the Philippines.

Based on the applicant's frustrated homicide conviction, the director concluded that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of crimes involving moral turpitude. Counsel disputes the finding of inadmissibility.

Counsel contends that the applicant is not inadmissible because he was granted absolute and unconditional pardon by the President of the Philippines, which effectively erases the criminal conviction. Counsel cites a Philippine case addressing the impact of a pardon and asserts that Philippine law should apply as to the effect and consequences of the applicant's absolute pardon. Counsel further asserts that the applicant's frustrated homicide conviction is not a crime involving moral turpitude, as that concept is understood under Philippine jurisprudence.

As an initial matter, the AAO notes that a foreign conviction will serve as a basis for a finding of inadmissibility where it is for conduct deemed criminal by *United States* standards. *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981) (emphasis added). Thus, we apply U.S. laws to determine whether the applicant's foreign conviction constitutes a crime involving moral turpitude, and in determining the impact of a foreign pardon on admissibility.

The AAO notes that counsel has cited no U.S. legal authority in support of the claim that the applicant's offense is no longer a conviction due to the applicant's foreign pardon. Pursuant to *Matter of B-*, 7 I&N Dec. 166, 167 (BIA 1956), an offense for which an applicant is granted a foreign pardon remains a conviction for purposes of inadmissibility or deportability. As such, the applicant's conviction will render the applicant inadmissible if it is for an offense that involves moral turpitude under U.S. laws, despite the presidential pardon he received.

The AAO notes that in finding the applicant's conviction to be a crime involving moral turpitude, the director concluded that frustrated homicide in the Philippines is equivalent to a voluntary manslaughter conviction in the United States. The AAO first considers under its *de novo*

authority whether this determination is supported or whether, in fact, the applicant's conviction for frustrated homicide is equivalent to murder under U.S. laws. Should we conclude that the offense equates to murder in the United States, we note that the applicant would be statutorily ineligible for a waiver of inadmissibility under section 212(h) of the Act under a plain reading of that waiver statute.

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)¹; *Nerpio v. People*, G.R. No. 155153 (S.C., July 24, 2007) (Phil.)²; *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.”)³; *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.”)⁴; 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)⁵.

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.)⁶; 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*

¹ Available at http://www.lawphil.net/judjuris/juri2009/may2009/gr_183566_2009.html

² Available at http://www.lawphil.net/judjuris/juri2007/jul2007/gr_155153_2007.html

³ Available at http://www.lawphil.net/judjuris/juri2002/nov2002/gr_139830_2002.html

⁴ Available at http://www.lawphil.net/judjuris/juri2012/jun2012/gr_120744_2012.html

⁵ Available at http://www.lawphil.net/judjuris/juri1966/jun1966/gr_l-17666_1966.html

⁶ Available at http://www.lawphil.net/judjuris/juri1996/jul1996/gr_115008_09_1996.html

(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.”)⁷.

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

In the present case, the director summarily concluded that the elements of frustrated homicide for which the applicant was convicted were factually similar to the crime of voluntary manslaughter in the United States. The AAO reviews this determination to decide today whether the applicant’s frustrated homicide conviction constitutes voluntary manslaughter or “an attempt or conspiracy to commit murder” under section 212(h)(2) of the Act.

Voluntary manslaughter and murder in the United States both involve an unlawful, intentional killing. As set forth in our discussion of American jurisprudence, provocation and “heat of passion” are the distinguishing factors between the two offenses in the United States. *See Paul*, 37 F.3d at 499; *Moore*, 2013 WL 512342, at *5; *Browner*, 889 F.2d at 552.

Similar to both voluntary manslaughter and murder in the United States, one incurs criminal liability for both murder and homicide in the Philippines when those offenses are 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 (malice 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. We note that 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. *Paul*, 37 F.3d at 499.

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

⁷ Available at <http://mclaw08.files.wordpress.com/2011/07/criminal-law-review.pdf>

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 proffered include an absolute presidential pardon and the appellate decision in his case issued by the Court of Appeals in Manila. The record does not contain the criminal information or the full trial court decision. The appellate decision, however, does set forth the penalty determinations of the trial court, which specifically indicate that the applicant was sentenced after a finding that there was an “absence of any mitigating or aggravating circumstance to off-set one another.” 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)⁸; *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. . . .”)⁹; *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)¹⁰; *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)¹¹. The AAO further notes that although the appellate court overturned the trial court’s finding that the applicant committed the unlawful killing with treachery (thus, reducing the frustrated murder offense to frustrated homicide), it affirmed the court’s judgment in all other aspects. Accordingly, the trial court’s determination that there were no mitigating circumstances does not appear to have been disturbed on appeal.

The AAO also observes that the Philippine Supreme Court has held that the mitigating circumstances of passion and obfuscation require: (1) that there be an act both unlawful and

⁸ Available at http://www.lawphil.net/judjuris/juri1978/may1978/gr_30355_1978.html

⁹ Available at http://www.lawphil.net/judjuris/juri1983/may1983/gr_1_31327_29_1983.html

¹⁰ Available at http://www.lawphil.net/judjuris/juri2010/jul2010/gr_175023_2010.html

¹¹ Available at http://www.lawphil.net/judjuris/juri1984/sep1984/gr_166859_1984.html

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 arguments on appeal, all of which were rejected, 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. There is nothing in the record of conviction before the AAO indicating that the trial court found the applicant to have acted under provocation or in a heat of passion.

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, which would otherwise negate the requisite malice or mens rea.

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 from attempted murder.

Having found that the applicant's frustrated homicide conviction is akin to attempted murder in the United States, the AAO now considers the applicant's contention that his conviction was not for an offense that constituted a crime involving moral turpitude.

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.)

Based on our analysis of Philippine jurisprudence, the AAO concludes that the applicant's conviction for frustrated homicide under Articles 249 and 6 of the RPC constitutes a crime involving moral turpitude under a categorical inquiry, because a conviction for the offense requires both reprehensible conduct and mens rea or vicious motive (intent to kill). *See, e.g., Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965).

Citing *IRRI v. NLRC*, G.R. No. 97239 (S.C., May 12, 1993) (Phil.)¹², counsel contends that frustrated homicide was found not to involve moral turpitude under Philippine law where the perpetrator's intention was only to defend his person and not to slay the victim, and where there were no aggravating circumstances. Counsel's reliance on this case is misplaced. As noted, we apply U.S. laws and precedent in determining whether the applicant's foreign conviction is a crime involving moral turpitude that renders him inadmissible. *See Matter of McNaughton, supra*. Additionally, we observe that in *IRRI v. NLRC*, the issue of moral turpitude is raised in the context of employment/labor law, where the applicant was terminated from employment because of a finding that he had been convicted of a crime involving moral turpitude. Moreover, the court there acknowledged that homicide can involve moral turpitude, but under the specific facts of the case, found that the homicide offense did not involve moral turpitude because it resulted from an act of incomplete self-defense (a mitigating circumstance) arising from an unlawful aggression by the victim. In the instant case, we note again that the trial and appellate courts did not identify any mitigating circumstances that would, in essence, negate the malice and intent that was otherwise required for a conviction for frustrated homicide under the RPC. The AAO therefore concludes that the applicant's conviction is a crime involving moral turpitude.

Given our determination that the applicant's frustrated homicide conviction is akin to attempted murder in the United States, the AAO concludes that the applicant is: (1) inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime involving moral turpitude; and (2) is statutorily ineligible for a waiver under section 212(h) of the Act, which is unavailable to applicants who have been convicted of murder or an attempt or conspiracy to commit murder. We therefore need not consider whether the heightened discretionary standard of 8 C.F.R. § 212.7(d) applies to the applicant's waiver application.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility rests with the applicant. *See* section 291 of the Act. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed and the waiver application will be denied.

ORDER: The appeal is dismissed.

¹² Available at http://www.lawphil.net/judjuris/juri1993/may1993/gr_97239_1993.html