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

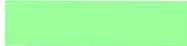


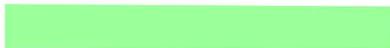
U.S. Citizenship  
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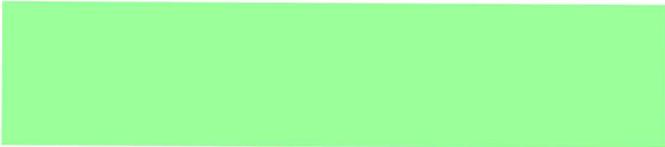
**JUN 19 2013**

Office: MANILA, PHILIPPINES

FILE: 

IN RE: 

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,

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

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The application for a waiver of inadmissibility 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 69-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 applying for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), in conjunction with an immigrant visa application, in order to reside in the United States with his U.S. citizen daughter and lawful permanent resident wife.

The Acting Field Office Director concluded that the applicant's waiver application under section 212(h) of the Act was statutorily barred because he had been convicted of a crime in the Philippines that is the equivalent of second degree murder in the United States. *Field Office Director's Decision*, dated June 28, 2010. He denied the applicant's Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly.

On appeal, counsel states that the field office director was erroneous in his conclusion of both law and fact that the applicant was not eligible to apply for a waiver of inadmissibility. Counsel requested an additional six months to submit a brief and supporting documentation, which have not been forth coming.

The record of evidence includes, but is not limited to, the applicant's written response to the Form I-601 questionnaire; statements of the applicant's lawful permanent resident wife and U.S. citizen daughter; the applicant's wife's medical records; criminal background certifications for the applicant; and the Philippine court order indicating the applicant's discharge from probation. 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.

(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 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 indicates that in 1983 he was convicted of homicide in the Philippines, served eight months in jail, and was sentenced to probation. The applicant has not furnished copies of his conviction records. However, he has confirmed the conviction and sentence he served. *See Form I-601 Supplemental Questionnaire.* Moreover, the record includes the order of the Regional Trial Court in Cebu City, Philippines, discharging the applicant from probation on February 4, 1993, which demonstrates that the applicant's probation related to the charge of homicide. Our review of Philippine law indicates that the crime of homicide is found under Article 249 of the Revised Penal Code of the Philippines.

Based on the foregoing conviction, the director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act, for having been convicted of a crime 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, we review here the director's conclusion that the applicant's conviction for homicide is the equivalent of second degree 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 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. *Field Office Director's Decision*, at 6. The director further found that the foreign homicide offense is not the equivalent of manslaughter<sup>1</sup> 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.

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,

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<sup>1</sup> The director did not distinguish between voluntary and involuntary manslaughter in the analysis.

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)<sup>2</sup>; *Nerpio v. People*, G.R. No. 155153 (S.C., July 24, 2007) (Phil.)<sup>3</sup>; *Adame v. Hon. Court of Appeals*, G.R. No. 139830 (S.C., Nov. 21, 2002) (Phil.) (“A conviction for

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<sup>2</sup> Available at [http://www.lawphil.net/judjuris/juri2009/may2009/gr\\_183566\\_2009.html](http://www.lawphil.net/judjuris/juri2009/may2009/gr_183566_2009.html)

<sup>3</sup> Available at [http://www.lawphil.net/judjuris/juri2007/jul2007/gr\\_155153\\_2007.html](http://www.lawphil.net/judjuris/juri2007/jul2007/gr_155153_2007.html)

frustrated homicide requires proof of intent to kill.”<sup>4</sup>; *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.”)<sup>5</sup>; 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)<sup>6</sup>.

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.)<sup>7</sup>; see also 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.”)<sup>8</sup>.

### 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 director. We need only decide whether the applicant’s homicide conviction constitutes “an attempt or conspiracy to commit murder” under section 212(h)(2) of the Act. We acknowledge that in a prior decision, the AAO found frustrated homicide under Philippine law to be the equivalent of attempted murder. In that decision, however, we did not discuss the specific circumstances underlying the conviction, or do the in-depth analysis we do today. For the reasons stated in this decision, we now conclude that that determination was not wholly correct. See *Matter of \_\_\_*, 2011 WL 7068470, at \*2 (AAO, Apr. 13, 2011).

Relying upon American jurisprudence, which addressed the general offense of manslaughter (both voluntary and involuntary), the director determined that manslaughter did not involve intent to kill. Accordingly, he found 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. The director erred in making no distinction between voluntary and involuntary manslaughter. Unlike involuntary manslaughter, murder and voluntary manslaughter are both intentional crimes under

<sup>4</sup> Available at [http://www.lawphil.net/judjuris/juri2002/nov2002/gr\\_139830\\_2002.html](http://www.lawphil.net/judjuris/juri2002/nov2002/gr_139830_2002.html)

<sup>5</sup> Available at [http://www.lawphil.net/judjuris/juri2012/jun2012/gr\\_120744\\_2012.html](http://www.lawphil.net/judjuris/juri2012/jun2012/gr_120744_2012.html)

<sup>6</sup> Available at [http://www.lawphil.net/judjuris/juri1966/jun1966/gr\\_1-17666\\_1966.html](http://www.lawphil.net/judjuris/juri1966/jun1966/gr_1-17666_1966.html)

<sup>7</sup> Available at [http://www.lawphil.net/judjuris/juri1996/jul1996/gr\\_115008\\_09\\_1996.html](http://www.lawphil.net/judjuris/juri1996/jul1996/gr_115008_09_1996.html)

<sup>8</sup> Available at <http://mclaw08.files.wordpress.com/2011/07/criminal-law-review.pdf>

U.S. federal laws, as is homicide in the Philippines. *See Moore*, 2013 WL 512342, \*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. We therefore conclude that the fact that 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. As previously indicated, the distinguishing factors between murder and voluntary manslaughter in the United States are the presence or absence of provocation and “heat of passion.” *See Paul*, 37 F.3d at 499; *Moore*, 2013 WL 512342, \*5; *Browner*, 889 F.2d at 552.

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.

We also observe 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 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*. Thus, much like defendants in the United States, the accused in the Philippines may present evidence of mitigating circumstances, such as provocation.

As the criminal court makes the determination as to whether there are any mitigating or aggravating circumstances, the AAO looks to the record of conviction to determine whether any such determination was made in the instant case. *See generally* RPC arts. 62-71; *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)<sup>9</sup>; *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. . . .")<sup>10</sup>; *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)<sup>11</sup>; *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)<sup>12</sup>.

The applicant here appears to contend in his Form I-601 Supplemental Questionnaire that in killing the victim, he acted under mitigating circumstances, possibly in heat of passion, provocation, and self-defense. However, in this case, the record does not contain any of the applicant's conviction records, aside from the trial court order discharging him from probation. Thus, the AAO is unable to determine whether mitigating circumstances were found by the trial court in order to assess whether his conviction would equate to voluntary manslaughter in the United States, rather than murder.

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 record, the AAO is unable to conclude that the applicant has met his burden. He has failed to show that the crime of 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 record and applicable laws, we find that the applicant's homicide conviction is the equivalent of attempted murder in the United States, in that it is an 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.

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.

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<sup>9</sup> Available at [http://www.lawphil.net/judjuris/juri1978/may1978/gr\\_30355\\_1978.html](http://www.lawphil.net/judjuris/juri1978/may1978/gr_30355_1978.html)

<sup>10</sup> Available at [http://www.lawphil.net/judjuris/juri1983/may1983/gr\\_1\\_31327\\_29\\_1983.html](http://www.lawphil.net/judjuris/juri1983/may1983/gr_1_31327_29_1983.html)

<sup>11</sup> Available at [http://www.lawphil.net/judjuris/juri2010/jul2010/gr\\_175023\\_2010.html](http://www.lawphil.net/judjuris/juri2010/jul2010/gr_175023_2010.html)

<sup>12</sup> Available at [http://www.lawphil.net/judjuris/juri1984/sep1984/gr\\_166859\\_1984.html](http://www.lawphil.net/judjuris/juri1984/sep1984/gr_166859_1984.html)

(b)(6)

**ORDER:** The appeal is dismissed.