

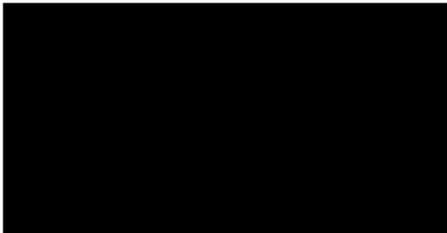
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

PUBLIC COPY

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



U.S. Citizenship  
and Immigration  
Services



B9

DATE:

Office: VERMONT SERVICE CENTER

FILE:

APR 26 2011

EAC 09 066 50056

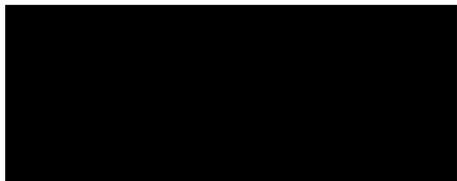
IN RE:

Petitioner: ANUP PIYA

PETITION:

Petition for Immigrant Abused Spouse Pursuant to Section 204(a)(1)(A)(iii) of the  
Immigration and Nationality Act, 8 U.S.C. § 1154(a)(1)(A)(iii)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, and the AAO's previous decision will be affirmed. The petition remains denied.

The petitioner seeks immigrant classification under section 204(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii), as an alien battered or subjected to extreme cruelty by a United States citizen.

On February 16, 2010, the director denied the petition, determining that the petitioner had not established that he had been subjected to battery or extreme cruelty perpetrated by his United States citizen spouse or that he had entered into the marriage in good faith. Counsel for the petitioner timely submitted a Form I-290B, Notice of Appeal or Motion, and a brief in support of the appeal. Upon review, the AAO concurred with the director's decision and dismissed the appeal. Counsel timely submits a Form I-290B, Notice of Appeal or Motion, and requests that the matter be reopened and the decision reconsidered. Counsel submits a brief in support of the motion.

#### *Applicable Law and Regulations*

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Section 204(a)(1)(A)(iii) of the Act provides that an alien who is the spouse of a United States citizen may self-petition for immigrant classification if the alien demonstrates that he or she entered into the marriage with the United States citizen spouse in good faith and that during the marriage, the alien or a child of the alien was battered or subjected to extreme cruelty perpetrated by the alien's spouse. In addition, the alien must show that he or she is eligible to be classified as an immediate relative under section 201(b)(2)(A)(i) of the Act based on his or her relationship to the abusive spouse, resided with the abusive spouse, and is a person of good moral character. Section 204(a)(1)(A)(iii)(II) of the Act, 8 U.S.C. § 1154(a)(1)(A)(iii)(II).

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition.

The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

Section 204(a)(1)(J) of the Act states, in pertinent part:

In acting on petitions filed under clause (iii) or (iv) of subparagraph (A) . . . , or in making determinations under subparagraphs (C) and (D), the [Secretary of Homeland Security] shall consider any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the [Secretary of Homeland Security].

The eligibility requirements are further explained in the regulation at 8 C.F.R. § 204.2(c)(1), which states, in pertinent part:

(vi) *Battery or extreme cruelty.* For the purpose of this chapter, the phrase “was battered by or was the subject of extreme cruelty” includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence. The qualifying abuse must have been committed by the citizen . . . spouse, must have been perpetrated against the self-petitioner . . . and must have taken place during the self-petitioner’s marriage to the abuser.

\* \* \*

(ix) *Good faith marriage.* A spousal self-petition cannot be approved if the self-petitioner entered into the marriage to the abuser for the primary purpose of circumventing the immigration laws. A self-petition will not be denied, however, solely because the spouses are not living together and the marriage is no longer viable.

The evidentiary guidelines for a self-petition under section 204(a)(1)(A)(iii) of the Act are further explained in the regulation at 8 C.F.R. § 204.2(c)(2), which states, in pertinent part:

*Evidence for a spousal self-petition –*

(i) *General.* Self-petitioners are encouraged to submit primary evidence whenever possible. The Service will consider, however, any credible evidence relevant to the petition. The determination of what evidence is credible and the weight to be given that evidence shall be within the sole discretion of the Service.

\* \* \*

(iv) *Abuse.* Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, and other social service agency personnel. Persons who have obtained an order of protection against the abuser or have taken other legal steps to end the abuse are strongly encouraged to submit copies of the relating legal documents. Evidence that the abuse victim sought safe-haven in a battered women's shelter or similar refuge may be relevant, as may a combination of documents such as a photograph of the visibly injured self-petitioner supported by affidavits. Other forms of credible relevant evidence will also be considered. Documentary proof of non-qualifying abuses may only be used to establish a pattern of abuse and violence and to support a claim that qualifying abuse also occurred.

\* \* \*

(vii) *Good faith marriage.* Evidence of good faith at the time of marriage may include, but is not limited to, proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences. Other types of readily available evidence might include the birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship. All credible relevant evidence will be considered.

#### *Pertinent Facts and Procedural History*

The petitioner is a native and citizen of Nepal. He entered the United States on August 26, 2003, on an F-1 student visa. On June 12, 2006, the petitioner married S-W<sup>1</sup>, the claimed abusive United States citizen spouse. On December 29, 2008, the petitioner filed the Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant. On October 26, 2009, the director issued a request for evidence and on January 21, 2010, the petitioner responded with additional evidence. On February 16, 2010, the denied the petition and on August 20, 2010, the AAO affirmed the director's decision.

#### *Motion to Reopen and Motion to Reconsider*

Counsel for the petitioner timely submits a Form I-290B, Notice of Appeal or Motion, checking the box indicating that a motion to reconsider the decision is requested. The AAO observes that the record on motion does not include any new facts that are supported by affidavits or other documentary evidence, and thus a motion to reopen the matter to consider new evidence is not granted. However, counsel provides a brief and requests that the AAO reconsider the petitioner's spouse's infidelity and fraudulent misrepresentation of carrying another man's child at the time of marriage which was followed by a continual pattern of deceit and find that her acts constitute

---

<sup>1</sup> Name withheld to protect the individual's identity.

extreme cruelty under the Act. Counsel also requests that the petitioner's evidence regarding his good faith in entering the marriage be reconsidered. The motion is granted for such consideration.

### *Battery and Extreme Cruelty*

Counsel asserts that the petitioner's spouse began the cycle of extreme cruelty by withholding the fact that she was pregnant and carrying another man's child at the time of marriage and by continuing to withhold this information for several months after the marriage. Counsel indicates that the grounds for annulment in Texas include withholding such information. Counsel also references the United States Citizenship and Immigration Services (USCIS) Adjudicator's Field Manual which provides examples of false testimony, including false testimony regarding infidelity, which precludes an individual from establishing good moral character in order to naturalize as a United States citizen. Counsel contends that discounting the serious nature of the petitioner's spouse's infidelity, marriage fraud, and pattern of deceit in light of the seriousness with which these acts are viewed for annulment or naturalization purposes is arbitrary and capricious. Counsel avers that Congress intended that the definition of extreme cruelty be broadly construed and USCIS has provided no law or authority, indicating that infidelity coupled with a pattern of deceit does not amount to extreme cruelty.

Upon review of the evidence in the record, the record does not include probative evidence of the petitioner's former spouse's acts that constitute battery or extreme cruelty. The petitioner does not claim and the record does not show that the petitioner was subjected to battery. Rather, his claim is based on his spouse's pregnancy with another man's child at the time of marriage and her withholding of this information for several months during the marriage, acts which counsel asserts amount to extreme cruelty under the statute and regulations. We disagree. It is not that we discount the seriousness of infidelity and deceit; however, to establish extreme cruelty as contemplated by Congress when enacting the VAWA legislation, the petitioner must include testimony or evidence of an extreme concept of domestic violence. *See Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9<sup>th</sup> Cir. 2003) (interpreting the definition of extreme cruelty at 8 C.F.R. § 204.2(c)(1)(vi)). The petitioner's spouse's infidelity and deceit regarding her pregnancy are not actions that demonstrate an extreme concept of domestic violence. Nor does S-W-'s infidelity and withholding information regarding her pregnancy with another man's child as described constitute controlling actions or other abusive behavior that was part of a cycle of psychological or sexual violence. The record does not include evidence that her non-physical behavior was accompanied by any coercive actions or threats of harm, or that her actions were aimed at insuring dominance or control over the petitioner.

The record in this matter does not establish that S-W-'s actions were comparable to the types of acts described in the regulation at 8 C.F.R. § 204.2(c)(1)(vi), which include forceful detention, psychological or sexual abuse or exploitation, rape, molestation, incest, or forced prostitution. Nor has the petitioner established that S-W-'s behavior was part of an overall pattern of violence or coercion. As noted by the Ninth Circuit Court of Appeals, "[b]ecause every insult or unhealthy interaction in a relationship does not rise to the level of domestic violence . . . , Congress required a showing of extreme cruelty in order to ensure that [the law] protected against the extreme concept of domestic violence, rather than mere unkindness." *See Hernandez*

*v. Ashcroft*, 345 F.3d 824, 840 (9<sup>th</sup> Cir. 2003) (interpreting the definition of extreme cruelty at 8 C.F.R. § 204.2(c)(1)(vi)). The petitioner's testimony in this matter does not include probative, credible evidence establishing that he was subjected to battery or extreme cruelty as defined in the statute and regulation.

### *Good Faith*

Counsel lists the documents the petitioner provided to establish that he entered into the marriage in good faith and asserts that the law does not require the petitioner to present a vast sea of information documenting every aspect of the marriage.

We agree that the petitioner is not required to present voluminous documentation in order to establish that he entered into the marriage in good faith. However, the director and the AAO noted the deficiencies in the documentation submitted which counsel does not address on motion. Moreover, the petitioner's testimony regarding his interactions with S-W- prior to and during the marriage is cursory at best. The petitioner does not provide probative testimony regarding his courtship, marriage, or any shared experiences with S-W-. The key factor in determining whether a petitioner entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of the marriage. *See Bark v. INS*, 511 F.2d 1200 (9th Cir.1975). In this matter, the petitioner does not describe in detail how he met S-W-, their shared interests, their daily routines in detail, or any probative information for the record that assists in determining his intent when entering into the marriage. A finding of good faith involves an exploration of the dynamics of the relationship leading up to the marriage, to determine if this was a marriage of two people intending to share a life together. In this matter, the petitioner has not provided sufficient descriptive testimony or other documentation to establish his intent in entering into the marriage and has not provided evidence of the couple's claimed joint life for the four months the couple was married and living together. The record is insufficient to establish the petitioner intended to establish a life together with S-W- when entering into his marriage. Considered in the aggregate, the relevant evidence fails to demonstrate that the petitioner entered into marriage with S-W- in good faith, as required by section 204(a)(1)(A)(iii)(I)(aa) of the Act.

### *Conclusion*

The AAO, upon review of the evidence, affirms its previous decision that the petitioner failed to establish that he was subjected to battery or extreme cruelty perpetrated by his former spouse and that he failed to establish that he entered into the marriage in good faith. As discussed above, the record on motion does not include any further argument or evidence that overcomes the AAO's August 20, 2010 decision to dismiss the appeal. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The AAO's August 20, 2010 decision is affirmed. The petition remains denied.