



## Standards of Review Applied by the Board of Immigration Appeals

### Practice Advisory<sup>1</sup>

April 22, 2020

#### Introduction

This practice advisory discusses the standards of review that the Board of Immigration Appeals (BIA or Board) is required to employ when it reviews appeals of immigration judge (IJ) decisions. The advisory suggests arguments practitioners can make when the Board applies an incorrect standard of review. The advisory includes an appendix containing citations to select circuit court decisions reversing agency decisions on this basis.

#### 1. Over what types of decisions does the Board have appellate jurisdiction?

The Immigration and Nationality Act (INA) contains few actual references to the Board of Immigration Appeals.<sup>2</sup> However, 8 U.S.C. § 1103(g)(2) authorizes the Attorney General to establish regulations to carry out the INA. The regulation at 8 C.F.R. § 1003.1(b) authorizes the Board to review the following types of decisions:

- IJ decisions issued in exclusion, deportation, and removal cases;
- IJ decisions in asylum-only proceedings;
- IJ decisions relating to Temporary Protected Status;
- Bond, parole, or detention determinations;
- IJ decisions regarding custody of certain individuals subjected to prolonged detention;
- IJ decisions to rescind adjustment of status;
- Certain IJ decisions on applications for adjustment of status referred by USCIS or remanded to the immigration court;
- Decisions involving administrative fines and penalties;
- Certain decisions related to immigrant visa petitions;
- Certain decisions regarding parole or waivers; and
- Decisions in disciplinary proceedings involving practitioners or certain organizations.

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<sup>2</sup> See, e.g., 8 U.S.C. § 1101(a)(47)(B) (defining final removal order by reference to actions of the BIA); 8 U.S.C. §§ 1229a(b)(6)(B), (c)(5) (referencing administrative appeals); 8 U.S.C. § 1103(g)(1) (referencing the Executive Office for Immigration Review).

The regulations also state that the BIA lacks jurisdiction over certain determinations, e.g., the voluntary departure period length and IJ decisions reviewing adverse credible fear determinations or upholding adverse reasonable fear determinations. *See* 8 C.F.R. §§ 1003.1(b)(2), (3); 1003.42(f); 1208.31(g)(1).

## **2. What is the scope of the Board’s appellate review?**

The scope of the BIA’s appellate review is set by 8 C.F.R. § 1003.1(d)(3), which provides that:

- (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.
- (ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.
- (iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo*.
- (iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.

## **3. Does 8 C.F.R. § 1003.1(d)(3) govern what standard of review the Board should employ to review IJ decisions raising factual, legal, and discretionary claims?**

Yes. Historically, the Board reviewed all aspects of IJ decisions *de novo*. *Matter of S-H-*, 23 I&N Dec. 462, 463-64 (BIA 2002). In 2002, however, as part of a larger reform of the BIA’s structure intended to streamline appeals, the U.S. Department of Justice (DOJ) promulgated 8 C.F.R. § 1003.1(d)(3). *See Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. 54878, 54902 (Aug. 26, 2002). The change provided a more deferential standard of review for factual findings, including credibility determinations.

Under 8 C.F.R. § 1003.1(d)(3), the BIA reviews an IJ’s factual findings for “clear error,” and it reviews all other issues *de novo*, including “questions of law, discretion, and judgment.” The BIA reviews mixed questions of law and fact under a bifurcated standard of review: reviewing underlying factual determinations for clear error and conclusions as to whether those facts meet the relevant legal standard *de novo*. *See, e.g., Kaplun v. Att’y Gen.*, 602 F.3d 260, 271 (3d. Cir. 2010); *Upatcha v. Sessions*, 849 F.3d 181, 184-85 (4th Cir. 2017); *see also Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. at 54888-89; *infra* Question 7.

#### 4. What does clearly erroneous mean, and what types of issues present factual questions that the Board must review for clear error?

The Supreme Court has recognized that “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985) (finding that, under a clear error standard, where a trier of fact’s “account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently”); *Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003). Thus, the clear error standard is unfavorable to the appealing party because it is highly deferential to the IJ.

Examples of questions of fact subject to clear error review may include:

- Credibility determinations;
- Determinations regarding dates, places, and manner of entry;
- Biographical information and personal characteristics, e.g., birthdates and places, the existence of a marriage/divorce, and an applicant’s religion, political opinion, or sexual orientation; and
- Predictions of future events.

Thus, the Board has held that the following determinations are questions of fact:

- Whether an individual was “waved through” a port of entry by an immigration officer;<sup>3</sup>
- Why a persecutor targeted an asylum applicant (*i.e.*, the persecutor’s motive);<sup>4</sup>
- What specific mistreatment an asylum applicant might suffer upon return to his or her country of origin;<sup>5</sup> and
- Whether a respondent knowingly and deliberately fabricated elements of an asylum claim.<sup>6</sup>

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<sup>3</sup> *Matter of Quilantan*, 25 I&N Dec. 285, 293 (BIA 2010).

<sup>4</sup> *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (“A persecutor’s actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by [the BIA] for clear error.”).

<sup>5</sup> *Matter of Z-Z-O-*, 26 I&N Dec. 586, 589-90 (BIA 2015) (overturning prior BIA precedent in light of contradictory decisions from several courts of appeals and “hold[ing] that an Immigration Judge’s predictive findings of what may or may not occur in the future are findings of fact, which are subject to a clearly erroneous standard of review”). However, the Board continues to review *de novo* whether, based on those facts, an individual “has established an objectively reasonable fear of persecution . . .” *Id.* at 590-91.

<sup>6</sup> *Matter of Y-L-*, 24 I&N Dec. 151, 159 (BIA 2007). By contrast, the BIA treats the question of whether a fabrication was “material” as a mixed question of fact and law. *Id.*

**5. What does de novo mean, and what types of issues present legal questions that the Board must review de novo?**

When a court conducts *de novo* review, it makes an independent determination of the relevant issues without deference to a prior determination. *See, e.g. United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967) (stating that *de novo* review requires “that the court should make an independent determination of the issues”); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (describing *de novo* review as “reviewing the appellate record anew”). Thus, the Board exercises its independent judgment when reviewing the IJ’s legal determinations or issues for which the outcome depends on the adjudicator’s interpretation of the law.

An issue of law is “[a] point on which the evidence is undisputed, the outcome depending on the court’s interpretation of the law[.]” *Black’s Law Dictionary*, 11th ed. 2019. Examples of questions of law include:

- Whether the immigration court has jurisdiction over a claim;<sup>7</sup>
- The meaning of a statutory or regulatory term or provision;<sup>8</sup>
- Whether a statute or regulation applies retroactively;<sup>9</sup> and
- Generally, whether a particular offense meets the statutory definition of a crime involving moral turpitude or an aggravated felony.<sup>10</sup>

**6. What is a discretionary determination, and what types of discretionary determinations must the Board review de novo?**

A discretionary determination is “the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not to act when a litigant is not entitled to demand the act as a matter of right.” *Black’s Law Dictionary*, *Discretion* (11th ed. 2019).<sup>11</sup>

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<sup>7</sup> *See, e.g., Matter of M-A-C-O-*, 27 I&N Dec. 477, 478 (BIA 2018) (stating that whether an IJ has jurisdiction over an unaccompanied minor who filed an asylum application after turning eighteen is a question of law reviewed *de novo*).

<sup>8</sup> *See, e.g., Matter of Cabrera*, 24 I&N Dec. 459, 460 (BIA 2008) (describing “whether the assessment of costs and surcharges constitutes a ‘penalty’ or ‘punishment’” pursuant to 8 U.S.C. § 1101(a)(48)(A)(ii) as a legal question).

<sup>9</sup> *See, e.g., Matter of Abdelghany*, 26 I&N Dec. 254, 265-72 (BIA 2014) (reviewing *de novo* whether the repeal of [former 8 U.S.C. § 1182(c)] applies retroactively).

<sup>10</sup> *See, e.g., Matter of Cervantes Nunez*, 27 I&N Dec. 238, 239-40 (BIA 2018) (assessing whether conviction constitutes a crime of violence as a question of law reviewed *de novo*). However, the statutory definition of some removable offenses may encompass a factual element. *See, e.g., 8 U.S.C. § 1101(a)(43)(D), (M); Barikyan v. Barr*, 917 F.3d 142, 146 & n.3 (2d Cir. 2019) (affirming clear error review over BIA’s assessment of the amount of funds under 8 U.S.C. § 1101(a)(43)(D) only where it “did not entail the decision of any legal question”).

<sup>11</sup> In its introductory text to the final rule which included 8 C.F.R. § 1003.1(d)(3)(ii), the Executive Office for Immigration Review (EOIR) indicated that “discretionary decisions” are synonymous with mixed questions of law and fact. *See Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. at 54888-89. However, the BIA

Examples of discretionary determinations include:

- Whether a respondent merits discretionary relief, including asylum, cancellation of removal, or voluntary departure;<sup>12</sup> and
- Whether “adequate safeguards” exists for a mentally incompetent respondent to proceed with removal proceedings.<sup>13</sup>

**7. What is a mixed question of law and fact, how does the BIA review them, and what are some examples of mixed questions?**

The Supreme Court has described a mixed question of fact and law is one “in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.” *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). In such cases, where the facts are undisputed and the reviewer merely must determine whether those undisputed facts meet the relevant legal standard, the BIA must apply *de novo* review. See *supra* Question 5 (discussing review of legal questions); *accord Myrie v. Att’y Gen.*, 855 F.3d 509, 516 (3d Cir. 2017) (stating that in cases involving mixed questions, “the Board should review without deference the ultimate conclusion that the findings of fact do not meet the legal standard”).<sup>14</sup>

However, mixed questions may involve both a disputed factual determination and a subsequent legal determination subject to review. In these cases, the BIA must use “a hybrid standard of review,” in which “factual determinations—the ‘what happened’ of the case—are subject to clearly erroneous review by the BIA” while any “legal judgment, applying the legal standard . . . to the facts and deciding whether that standard was met . . . is to be reviewed *de novo* by the Board.” *Upatcha v. Sessions*, 849 F.3d 181, 185 (4th Cir. 2017); see also *Alom v. Whitaker*, 910 F.3d 708, 713-14 (2d Cir. 2018); *Kaplun v. Att’y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010);

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must review questions of discretion *de novo*, see 8 C.F.R. § 1003.1(d)(3)(ii), while the BIA applies a bifurcated standard of review to mixed questions of law and fact, see *infra* Question 7.

<sup>12</sup> See, e.g., *Matter of A-H-*, 23 I&N Dec. 774, 778-79 (AG 2005) (asylum); *Matter of Pinzon*, 26 I&N Dec. 189, 195 n.2 (BIA 2013) (voluntary departure); *Matter of C-V-T-*, 22 I&N Dec. 7, 8-9 (BIA 1998) (cancellation of removal). Note, however, that, to the extent these decisions incorporate specific factual determinations, those determinations are subject to clear error review. *Board of Immigration Appeals: Procedural Reforms to Improve Case Management*, 67 Fed. Reg. at 54890.

<sup>13</sup> See *Matter of M-J-K-*, 26 I&N Dec. 773, 775-76 (BIA 2016) (“We hold that the Immigration Judge has discretion to select and implement appropriate safeguards, which we review *de novo*.”).

<sup>14</sup> The BIA has indicated that “question of ‘judgment’” has the same meaning as “mixed question of fact and law.” *Matter of V-K-*, 24 I&N Dec. 500, 502 (BIA 2008), *vacated on other grounds by Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015). However, this occurred in the context of determining that the relevant mixed question was subject to *de novo* review. The BIA must review questions of judgment *de novo*, see 8 C.F.R. § 1003.1(d)(3)(ii), while the BIA may apply a bifurcated standard of review to mixed questions of law and fact.

*Duncan v. Barr*, 919 F.3d 209, 215 (4th Cir. 2019); *Vitug v. Holder*, 723 F.3d 1056, 1063 (9th Cir. 2013). For example, the Third Circuit recognized that assessing the likelihood of torture presents a question with “two distinct parts” that require separate review. *Kaplun*, 602 F.3d at 271. “[W]hat is likely to happen to the petitioner if removed” is a factual finding subject to clear error review, while whether “what is likely to happen amount[s] to the legal definition of torture” is a legal question utilizing those facts, to be reviewed de novo. *Id.*<sup>15</sup>

Therefore, the BIA employs a bifurcated standard of review to cases that do not present pure questions of law. *See, e.g., Matter of Z-Z-O-*, 26 I&N Dec. at 592 (assessing “what may have occurred in [an individual’s country of origin] and what could occur if he is returned there” as findings of fact reviewed for clear error, but whether fear of persecution based on those facts is “well-founded” as a question of law); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390-91 (BIA 2014), *overruled on other grounds by Matter of A-B-*, 27 I&N Dec. 316, 317 (BIA 2018) (stating that whether a person is member of a particular social group is a factual question, while whether that group qualifies as a particular social group is a matter of law); *Matter of Islam*, 25 I&N Dec. 637, 638-69 (BIA 2011) (reviewing de novo whether established facts constitute “single scheme of criminal misconduct”); *Matter of A-G-G-*, 25 I&N Dec. 486, 488 (BIA 2011) (employing bifurcated standard of review to question of whether an asylum applicant was “firmly resettled” in third country prior to entering United States).

Other examples include:

- Whether hardship would be “exceptional and extremely unusual” for non-LPR cancellation;<sup>16</sup>
- Whether possible future mistreatment amounts to torture under the Convention Against Torture;<sup>17</sup> and
- Whether an individual qualifies for a good faith marriage waiver of the joint filing requirement to remove conditions on permanent residency.<sup>18</sup>

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<sup>15</sup> Circuit court review over whether the BIA properly reviewed of mixed questions of law and fact pursuant to its own regulations is distinct from how circuit courts themselves review mixed questions of law and fact presented in petitions for review.

<sup>16</sup> *Waldron v. Holder*, 688 F.3d 354, 361 (8th Cir. 2012).

<sup>17</sup> The Board applies clear error review to IJ factual findings as to whether an individual was more likely than not to suffer torture and *de novo* review as to whether such predictive events amount to torture. *See Turkson v. Holder*, 667 F.3d 523, 528-30 (4th Cir. 2012); *Kaplun*, 602 F.3d at 271.

<sup>18</sup> The Board reviews the underlying facts relating to the marriage for clear error and whether those facts establish a good faith marriage under 8 U.S.C. § 1186a(c)(4)(B) *de novo*. *See, e.g., Alom*, 910 F.3d at 712-14; *Upatcha*, 849 F.3d at 184-87.

**8. Do the standards of review in 8 C.F.R. § 1003.1(d)(3) apply to motions to reopen or reconsider filed with the BIA in the first instance?**

No. The regulation at 8 C.F.R. § 1003.1(d)(3) applies to appeals from IJ or USCIS decisions. However, certain motions come before the BIA directly. For example, with few exceptions, motions to reopen or reconsider can be filed with the BIA if the BIA issued the most recent decision on the merits.<sup>19</sup> Where the motion is properly filed with the BIA directly, the regulation governing the standard of review for appeals, by its own terms, does not apply. Instead, the BIA would apply the applicable standard for motions to reopen or motions to reconsider, respectively. *See* 8 U.S.C. § 1229a(c)(6) (motions to reconsider); 8 U.S.C. § 1229a(c)(7) (motions to reopen).

**9. What are some common errors in the BIA’s application of its standard of review?**

The BIA regularly makes errors in applying the standards of review in 8 C.F.R. § 1003.1(d)(3).

First, the BIA may fail to state the standard of review it is applying or may apply the wrong standard. *See Garcia-Mata v. Sessions*, 893 F.3d 1107, 1110 (8th Cir. 2018) (remanding because the court could not “discern from the Board’s decision whether it followed the governing regulations on standards or review”); *Sheriff v. Att’y Gen.* 587 F.3d 584, 592-93 (3d Cir. 2009) (finding that “[i]t is difficult, if not impossible, to determine what standard of review the BIA applied, and to what determinations”); *Tran v. Gonzales*, 447 F.3d 937, 944 (6th Cir. 2006) (faulting the BIA for “lack of reference to any standard of review”).

Second, the Board may state the correct standard of review in the decision but, in fact, apply it incorrectly. For example, the Board could declare that it is applying a clear error standard, but show no deference to the IJ’s findings in the decision. *See Zumel v. Lynch*, 803 F.3d 463, 476-77 (9th Cir. 2015) (remanding where the BIA recited clear error standard in its decision, only to overturn several of the IJ’s factual findings with nothing more than “conclusory statements”); *Waldron v. Holder*, 688 F.3d 354, 360-61 (8th Cir. 2012) (remanding where “BIA set forth the correct standard of review at the outset of its decision,” but “deviated from this standard”).<sup>20</sup>

Third, the BIA may err in applying the correct standard of review to mixed questions of law and fact. As discussed above, the BIA should review the factual determinations for clear error and should review the application of law to those facts *de novo*. Where the Board has failed to do so, federal courts have remanded with instructions to apply the correct standard of review. *See, e.g., Upatcha v. Sessions*, 849 F.3d 181, 185 (4th Cir. 2017) (remanding because the BIA reviewed an IJ’s good faith marriage determination only for clear error, even though it is a mixed question “subject to a hybrid standard of review”); *Alom v. Whitaker*, 910 F.3d 708, 713-14 (2nd Cir. 2018) (remanding where the BIA reviewed for clear error and “failed to acknowledge the *de*

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<sup>19</sup> For specific information on venue for motions, see American Immigration Council, [The Basics of Motions to Reopen EOIR-Issued Removal Orders](#) (Feb. 7, 2018).

<sup>20</sup> With respect to clear error review for factual findings, the Board may also err by engaging in its own factfinding in violation of 8 C.F.R. § 1003.1(d)(3)(iv). *See e.g., Hussam F. v. Sessions*, 897 F.3d 707, 723 (6th Cir. 2018) (remanding where the Board recited the correct clear error standard of review, but engaged in independent factfinding).

*novus* standard applicable to the mixed question whether the established facts were sufficient to establish a good faith marriage”).

#### **10. What options are available if the Board applies the wrong standard of review?**

If the BIA applies the wrong standard of review, there are two options. First, an individual could file a motion to reconsider within 30 days, which is appropriate when the BIA misapprehends an issue of law or fact.<sup>21</sup>

Second, *in addition to*, or *in lieu of*, filing a motion to reconsider with the BIA, an individual could file a petition of review with the appropriate circuit court of appeals having jurisdiction over the place where the IJ completed the proceedings, “no later than 30 days after the date of the final order of removal.” 8 U.S.C. § 1252(b)(1)-(2).<sup>22</sup>

If an individual files both a motion to reconsider and a petition for review, he or she may ask the court of appeals to hold the petition for review in abeyance while the BIA decides the motion to reconsider.

#### **11. What arguments are available on petition for review?**

Claims that the Board applied the wrong standard of review raise legal questions over which the courts have jurisdiction on petitions for review. *See generally* 8 U.S.C. § 1252(a)(1), (a)(2)(D).

Federal courts review *de novo* whether the BIA applied the correct standard of review, regardless of whether the underlying issue is factual or legal in nature. *See, e.g., Rosales Justo v. Sessions*, 895 F.3d 154, 161 (9th Cir. 2018) (stating that the BIA’s determination that the IJ clearly erred “is not . . . an ‘administrative finding of fact’ subject to the substantial evidence standard . . . but a legal determination” subject to *de novo* review).

When courts of appeals find that the BIA applied the wrong standard of review, they typically grant the petition for review and remand the case to the Board to apply the correct standard. *See, e.g., Estrada Martinez v. Lynch*, 809 F.3d 886, 897 (7th Cir. 2015) (“In the majority of cases in which the Board applied the incorrect standard of review . . . courts of appeals remand for further consideration under the correct standard of review.”); *Upacha v. Sessions*, 849 F.3d 181, 186-87 (4th Cir. 2017) (remanding where the BIA applied wrong standard of review to an IJ’s good faith marriage determination). Courts could also remand with instructions to the agency to rule in the petitioner’s favor. In *Vitug v. Holder*, for example, the Ninth Circuit found that the BIA had misapplied the clear error standard of review and directed the BIA to grant withholding of removal because “no reasonable factfinder” could reach a different conclusion. 723 F.3d 1056, 1065-66 (9th Cir. 2013).

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<sup>21</sup> 8 U.S.C. § 1229a(c)(6) (permitting motions to reconsider which “specify the errors of law or fact in the previous order”); 8 C.F.R. § 1003.2(b)(1) (same). Filing a motion to reconsider will not stay removal unless the Board grants a stay. 8 C.F.R. § 1003.2(f).

<sup>22</sup> *See also* American Immigration Council, [How to File a Petition for Review](#) (Nov. 2015).



Noncitizens challenging the BIA’s application of its standard for review before the courts of appeals should make clear that this issue is an argument for granting a petition for review. As such, it is distinct from the statement of the standard of review in the opening brief required under Federal Rule of Appellate Procedure 28(a). *See, e.g., Wu Lin v. Lynch*, 813 F.3d 122, 129 (2d Cir. 2016) (noting that the court of appeals applies *de novo* review to determine whether the BIA erred in applying clearly erroneous standard of review).<sup>23</sup>

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<sup>23</sup> For guidance regarding *federal court* standards of review, see U.S. Court of Appeals for the Ninth Circuit, [Standards of Review](#) (Jan. 2018).

## SELECT CIRCUIT COURT CITATIONS

### ***First Circuit***

*Rosales Justo v. Sessions*, 895 F.3d 154, 167 (1st Cir. 2018) (holding that the BIA misapplied clearly erroneous standard when it overturned an IJ's finding that the Mexican government was unable or unwilling to protect respondent from persecution and remanding).

### ***Second Circuit***

*Wu Lin v. Lynch*, 813 F.3d 122, 129-31 (2d Cir. 2016) (remanding for correct application of clear error review standard to IJ's negative credibility determination and citing cases).

*Alom v. Whitaker*, 910 F.3d 708, 713-14 (2d Cir. 2018) (remanding because "the BIA's commentary implies that it applied only clear error review to the entirety of the good faith marriage determination . . . and did not contemplate its authority to reweigh the evidence or to conclude that the IJ's legal conclusions were insufficient").

### ***Third Circuit***

*Sheriff v. Att'y Gen.*, 587 F.3d 584, 592-93 (3d Cir. 2009) (finding that "[i]t is difficult, if not impossible, to determine what standard of review the BIA applied, and to what determinations" and remanding with instructions to apply bifurcated standard of review to determination of whether DHS rebutted presumption of well-founded fear).

*Kaplun v. Att'y Gen.*, 602 F.3d 260, 272-73 (3d Cir. 2010) (remanding where the BIA impermissibly applied de novo review to IJ's factual findings underlying his determination that the respondent would likely face torture upon removal to home country).

*Myrie v. Att'y Gen.*, 855 F.3d 509, 516-17 (3d Cir. 2017) (remanding where the BIA erroneously applied clear error review, instead of bifurcated review, to petitioner's claim that government in country of origin would acquiesce in torture).

### ***Fourth Circuit***

*Duncan v. Barr*, 919 F.3d 209, 215 (4th Cir. 2019) (concluding that "whether a foreign-born child was in the 'physical custody' or her citizen parent under the CCA is a mixed question of fact and law," and thus IJ determinations were subject to bifurcated review by BIA).

*Upatcha v. Sessions*, 849 F.3d 181, 185-87 (4th Cir. 2017) (remanding where the BIA had reviewed an IJ's good faith marriage determination for clear error, when this is in fact a mixed question of law "subject to a hybrid standard of review.").

*Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 889-92 (4th Cir. 2019) (holding that whether a government will acquiesce in torture is a mixed question of law and fact subject to a bifurcated standard of review, and remanding).

### ***Fifth Circuit***

*Morales-Morales v. Barr*, 933 F.3d 456, 467 (5th Cir. 2019) (remanding where the Board claimed to review IJ’s grant of CAT protection for clear error but actually “impose[d] its own view on de novo review”).

*Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 229-30, 235 (5th Cir. 2009) (reversing and remanding a petition for review “[b]ecause the BIA applied the incorrect legal standard to conclude that the marriage was not entered into in good faith,” applying a de novo, rather than clear error, review to IJ factual determinations).

### ***Sixth Circuit***

*Hussam F. v. Sessions*, 897 F.3d 707, 723 (6th Cir. 2018) (remanding petition for review where the Board recited the clear error standard, but erroneously “engag[ed] in de novo factfinding”).

*Tran v. Gonzales*, 447 F.3d 937, 944 (6th Cir. 2006) (“Because BIA review under an incorrect standard of review implicates Tran’s due process rights, we conclude that remand to the BIA is appropriate . . .”).

### ***Seventh Circuit***

*Estrada-Martinez v. Lynch*, 809 F.3d 886, 896-97 (7th Cir. 2015) (remanding for the Board to reconsider its denial of petitioner’s CAT eligibility where it misapplied clear error review, substituting its own view of the evidence for the IJ’s).

*Rosiles-Camarena v. Holder*, 735 F.3d 534, 537-39 (7th Cir. 2013) (remanding because the Board substituted its own judgement for the IJ’s finding regarding likelihood of future persecution, rather than reviewing that finding for clear error).

### ***Eighth Circuit***

*Waldron v. Holder*, 688 F.3d 354, 360-61 (8th Cir. 2012) (remanding where “BIA set forth the correct standard of review at the outset of its decision,” but “deviated from this standard” by performing its own factfinding).

*Garcia-Mata v. Sessions*, 893 F.3d 1107, 1110 (8th Cir. 2018) (remanding petition for review because the court could not “discern from the Board’s decision whether it followed the governing regulations on standards or review” and “the Board never directly asserted that the immigration judge committed clear error”).

### ***Ninth Circuit***

*Vitug v. Holder*, 723 F.3d 1056, 1063-64 (9th Cir. 2013) (holding that the BIA misapplied clear error review when it substituted its own findings of fact for the IJ’s in a case regarding eligibility

for withholding of removal and CAT protection, and directing a grant of withholding of removal).

*Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012) (“We do not rely on the Board’s invocation of the clear error standard; rather, when the issue is raised, our task is to determine whether the BIA faithfully employed the clear error standard or engaged in improper de novo review of the IJ’s actual findings.”).

*Zumel v. Lynch*, 803 F.3d 463, 476-77 (9th Cir. 2015) (remanding where the BIA had recited the clear error standard of review, but overturned the IJ’s factual findings based on “conclusory statements”).

### ***Tenth Circuit***

*Kabba v. Mukasey*, 530 F.3d 1239, 1245-46 (10th Cir. 2008) (remanding where the BIA recited the clear error standard but did not defer to IJ’s factual findings regarding a likelihood of future persecution).

### ***Eleventh Circuit***

*Zhou Hua Zhu v. Att’y. Gen.*, 703 F.3d 1303, 1305 (11th Cir. 2013) (remanding where the BIA erroneously analyzed the petitioner’s risk of future persecution “not through the prism of clear error review, but rather after its own de novo consideration of the evidence”).

*Meridor v. Att’y Gen.*, 891 F.3d 1302, 1306-07 (11th Cir. 2018) (holding that the BIA misapplied clear error review in an asylum case because its basis for overturning the IJ was that it “simply disagreed and ‘was not persuaded’”).