Memorandum

BIA 08-03

Subject	Date
The Board's Standard/Scope of Review	May 23, 2008

To	From
Board Attorneys	Juan Osuna, Acting Chairman Ellen Liebowitz, Acting Senior Counsel

In 2002, the Attorney General issued a procedural reform regulation, which, in part, changed the standard and scope of review applied by the Board when reviewing a decision by an Immigration Judge. The standard/scope of review regulation is now found at 8 C.F.R. § 1003.1(d)(3).

This regulation mandates that the Board will not engage in *de novo* review of findings of fact determined by an Immigration Judge, but rather, shall review them only to determine whether the factual findings (including findings as to credibility) are clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i).[1] The Board has *de novo* authority over questions of law, discretion, and judgment and all other issues in appeals from decisions of Immigration Judges. *See* 8 C.F.R. § 1003.1(d)(3)(ii). The regulation also limits the Board's ability to engage in fact-finding in the course of deciding appeals. *See* 8 C.F.R. § 1003.1(d)(3)(iv).[2]

The reform regulation was accompanied by a detailed Supplementary Information, which among other things, explained the interplay of the clearly erroneous standard of review and the Board's *de novo* review authority. *See* 67 Fed. Reg. 54,878 (Aug. 26, 2002); *see also Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

EMPLOYMENT OF THE STANDARD/SCOPE OF REVIEW

When the Board reviews an Immigration Judge's decision, it is imperative to correctly identify and employ the standard of review being used by the Board. Depending on the particular needs of a case, it will often be appropriate to refer to the pertinent provisions of 8 C.F.R. § 1003.1(d)(3), along with the correct

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[1]The clearly erroneous standard of review does not apply to appeals filed before September 25, 2002. *See* 8 C.F.R. § 1003.3(f); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). The Board has *de novo* review authority over all issues arising in appeals filed before that date, with deference to the Immigration Judge in the area of credibility. *See e.g., Matter of A-S-*, 21 I&N Dec. 1106, 1109 (BIA 1998).

[2]Under 8 C.F.R § 1003.1(d)(3)(iii), the Board has *de novo* review authority over all questions arising in appeals from decisions issued by DHS officers.

terminology. The Board also has issued several precedent decisions, discussed below, addressing this regulation and the standard of review. These cases should be cited where appropriate. For example, where the Board is addressing an Immigration Judge's finding on whether a respondent met his or her burden of proof for protection under the Convention Against Torture (CAT), *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008), can be cited to explain why we will defer to the Immigration Judge's finding of facts insofar as they are not clearly erroneous, but we have *de novo* authority over the question of whether those facts support a conclusion that it is more likely than not that the respondent will be tortured upon return to his or her native country. Similarly, *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008) may be cited in instances where the Board is not finding any clear error on an Immigration Judge's *factfinding* in an asylum case, but is reaching a different conclusion on the *legal* issue of whether a respondent qualifies for asylum.

While each decision must be drafted in accordance with the particular circumstances of the case, it is of paramount importance that there are no ambiguities as to the standard of review being employed. For example, when referring to a legal, discretionary, or other determination made by an Immigration Judge over which the Board has *de novo* review authority, do not use language such as "there was no clear error by the Immigration Judge." Similarly, when reviewing factual findings by an Immigration Judge, be sure to refer to a lack of or existence of "clear" error. Do not use the term "substantial evidence" as this is not the standard the Board uses to review factual, legal, or discretionary issues, and use of that incorrect term can be very confusing to the parties and to a reviewing court.

RELEVANT PRECEDENT DECISIONS

The Board has issued a number of precedent decisions discussing the standard of review under the reform regulation. The two most recent precedents were issued this month. These decisions should be consulted and cited in decisions when discussing the standard of review. The precedent decisions are the following:

Matter of S-H-, 23 I&N Dec. 462 (BIA 2002). This case explains that under the new regulations, the Board has limited fact-finding ability on appeal, which heightens the need for Immigration Judges to include in their decisions clear and complete findings of fact that are supported by the record and are in compliance with controlling law. It adds that if the Immigration Judge does not conduct adequate factfinding, a remand may be necessary.

Matter of R-S-H-, 23 I&N Dec. 629 (BIA 2003). The Board discusses the highly deferential nature of the clearly erroneous standard of review. *See e.g, id.* at 637 ("[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." (*quoting from United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Matter of A-S-B-, 24 I&N Dec. 493 (BIA 2008). In this case, the court of appeals granted the government's unopposed motion to remand for the Board to explain its earlier statement that the issue of whether the alien met his burden of proof to show a "well-founded" fear of persecution was a question of law warranting a *de novo* review pursuant to 8 C.F.R. § 1003.1(d)(3)(ii). The Board, considering the guidance provided in the Supplementary Information to the procedural reform regulation, explained that the Board should defer

to the factual findings of an Immigration Judge, unless clearly erroneous, but retains independent judgment and discretion, subject to applicable governing standards, regarding pure questions of law and the application of a particular standard of law to those facts. The decision also explains that to determine whether established facts are sufficient to meet a legal standard, such as a "well-founded fear," the Board is entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge, or to conclude that the foundation for the Immigration Judge's legal conclusions was insufficient or otherwise not supported by the evidence of record. This case also contains a discussion about the Board's authority to consider the total content of documentary evidence admitted into the record by an Immigration Judge. *See Matter of A-S-B-, supra*, at 498.

Matter of V-K-, 24 I&N Dec. 500 (BIA 2008). In this case, the court of appeals granted the government's unopposed motion to remand for clarification of whether the Board had authority to reverse the Immigration Judge's finding that the respondent established, by a preponderance of the evidence, that he would more likely than not be tortured upon return to his native country. Upon considering the regulations and the Supplementary Information, the Board found it had *de novo* review authority over an Immigration Judge's prediction or finding regarding the likelihood that an alien will be tortured upon return to his native country, because the question relates to whether the ultimate statutory requirement for establishing eligibility for relief from removal has been met. The Board also clarified that while it reviewed an Immigration Judge's factual rulings for clear error, a prediction of the probability of future torture, although it may be derived in part from "facts," is not the sort of determination limited by the clearly erroneous standard. We noted that the fact that the Immigration Judge's prediction derived from his acceptance of an expert witness's testimony does not affect its nature as a prediction relating to whether an ultimate legal standard has been met.