

# THE BOARD OF IMMIGRATION APPEALS’ STANDARD OF REVIEW: AN ARGUMENT FOR REGULATORY REFORM

SCOTT REMPELL\*

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\* Assistant Professor of Law, South Texas College of Law. My thanks to colleagues who provided helpful comments and feedback during my presentation of this Article at a faculty scholarship workshop hosted by the South Texas College of Law in January 2011.

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## INTRODUCTION

In 2002, the Attorney General issued regulations that dramatically altered how the Board of Immigration Appeals (Board) would review decisions of immigration judges.<sup>1</sup> The regulations are best known for permitting a single Board member to adjudicate an appeal in most instances,<sup>2</sup> and providing Board members with authority to affirm decisions of immigration judges without the need to issue a separate opinion.<sup>3</sup> These particular changes to the Board's adjudication of immigration appeals caused a strong backlash among commentators and immigrant rights groups, who were highly critical of these aspects of the regulation.<sup>4</sup>

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1. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002) (codified as amended at 8 C.F.R. § 1003 (2010)).

2. See 8 C.F.R. § 1003.1(e)(6) (2010) (listing the six circumstances when a case may be assigned to a three-member panel, which include the need to issue a precedential decision construing the meaning of a statute or regulation). An earlier regulation promulgated in 1999 permitted a single Board of Immigration Appeals (Board) member to decide an appeal in much more limited instances. See 8 C.F.R. §§ 1.1–3.11 (1999); Executive Office for Immigration Review, Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,136 (Oct. 18, 1999) (codified at 8 C.F.R. § 3.1(a)(7) (2000)).

3. See 8 C.F.R. § 1003.1(e)(4) (2010).

4. See, e.g., Capital Area Immigrants' Rights Coal. v. U.S. Dep't of Justice, 264 F. Supp. 2d 14 (D.D.C. 2003) (lawsuit filed by immigrant rights coalition seeking to invalidate the streamlining regulations); Susan Burkhardt, *The Contours of Conformity: Behavioral Decision Theory and the Pitfalls of the 2002 Reforms of Immigration Procedures*, 19 GEO. IMMIGR. L.J. 35, 69–71 (2004) (faulting the 2002 regulatory reforms for permitting single Board members to consider appeals that “present close factual questions or more complicated legal issues”); Evelyn H. Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals's Summary Affirmance Procedures*, 16 STAN. L. & POL'Y REV. 481, 499–501 (2005); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 604 (2009) (discussing the “[s]erious problems” that “beset adjudication before the Board of Immigration Appeals” that have been caused by the 2002 regulations); John R.B. Palmer,

The 2002 regulations also included another, less-discussed reform to the Board's appellate authority. That reform curtailed the Board's scope of review of decisions rendered by an immigration judge. Before 2002, the Board could evaluate *de novo* all aspects of an immigration judge's decision,<sup>5</sup> but under the 2002 regulations the Board could only reverse the immigration judge's findings of fact if those findings were clearly erroneous.<sup>6</sup> The Board still retained *de novo* authority over all matters other than findings of fact.<sup>7</sup> Accordingly, this regulatory change appeared to do nothing more than place the Board on par with other appellate bodies that defer to the factual findings of the initial adjudicator,<sup>8</sup> and there would seem to be nothing controversial about doing so. However, this small procedural reform has left the Board's scope of review in disarray, and created widespread confusion among immigration adjudicators at the agency level and the federal courts of appeals tasked with review of Board decisions.<sup>9</sup>

The implications of the uncertainty surrounding the scope-of-review regulation are vast. The Board adjudicates tens of thousands of immigration appeals every year, and the standard of review is an issue that the Board must consider in every one of these cases.<sup>10</sup> The decisions

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Stephen W. Yale-Loehr & Elizabeth Cronin, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 29–32 (2005); Shruti Rana, "Streamlining" the Rule of Law: How the Department of Justice Is Undermining Judicial Review of Agency Action, 2009 U. ILL. L. REV. 829, 831–39, 845–49.

5. See *In re S-H-*, 23 I. & N. Dec. 462, 463–64 (BIA 2002); *In re Vilanova-Gonzalez*, 13 I. & N. Dec. 399, 402 (BIA 1969); *In re B-*, 7 I. & N. Dec. 1, 1 (A.G. 1956).

6. See 8 C.F.R. § 1003.1(d)(3)(i).

7. See *id.* § 1003.1(d)(3)(ii).

8. See *Dickinson v. Zurko*, 527 U.S. 150, 153 (1999) (reviewing the level of deference that the appellate courts must afford to agency decisions governed by the Administrative Procedure Act (APA)); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (discussing the application of the clearly erroneous standard in appellate courts' review of the factual findings of district court judges); 29 C.F.R. § 1614.405 (2010) (stating the level of deference for factual findings afforded to appeals of administrative law judges within the Equal Employment Opportunity Commission is "substantial evidence"); see also FED. R. CIV. P. 52(a). See generally *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (providing the initial "definite and firm conviction" language employed almost universally in subsequent discussions of the clearly erroneous standard of review).

9. See *infra* Parts III & IV. After the Board issues a decision, an appeal must be filed within thirty days in the federal court of appeals sitting in the applicable venue. See 8 U.S.C. § 1252(a)(5), (b)(1)–(2) (2006). For example, if a removal proceeding is held in an immigration court in New York, then the appeal must be filed in the U.S. Court of Appeals for the Second Circuit.

10. See U.S. DEP'T OF JUSTICE EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2010 STATISTICAL YEAR BOOK S2 fig.27 (2011) [hereinafter STATISTICAL YEAR BOOK], available

rendered by the Board have a far-reaching impact on the immigrants involved. In many cases, these decisions can be the difference between an immigrant's right to remain in the United States and a deportation order that forces an immigrant to leave the country.

This Article seeks to fill a void in the literature by providing a comprehensive analysis of the 2002 reforms to the Board's scope of review.<sup>11</sup> On the basis of this examination of the impact that the scope-of-review regulation has had on the adjudication of immigration cases, this Article will demonstrate why a change in the current regulation is necessary.<sup>12</sup> To do this, Part I will review the language of the 2002 scope-of-review regulation and discuss the Attorney General's commentary accompanying the rule. Part II will shift to a discussion of the Board's precedential decisions that interpret and apply the scope-of-review regulation and an assessment of the shortcomings in these decisions. In Part III, this Article will review how the inconsistent interpretations of the scope-of-review regulation in the federal courts of appeals are indicative of the problems inherent in the current regulatory framework. Subsequently, Part IV will advocate that the current regulation be amended to provide the Board with *de novo* authority to review findings of fact, and specify the justifications for reaching this determination.

#### I. THE CURRENT REGULATORY FRAMEWORK AND THE ATTORNEY GENERAL'S INTERPRETATION OF THE REGULATION

A review of the regulation that altered the Board's scope of review will help to frame the problems that emerged. The regulation 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

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at <http://www.justice.gov/eoir/statpub/fy10syb.pdf> (indicating the Board considered 33,305 appeals in fiscal year 2010).

11. Although other articles have discussed the scope-of-review regulation—see, e.g., Burkhardt, *supra* note 4, at 77, and Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 27–28 (2007)—the regulation is never the primary area of concern, nor does it appear that the analyses of this aspect of the regulation have been particularly detailed—see, e.g., Family, *supra* note 4, at 605, who omits the change in the Board's scope of review from a list of major streamlining reforms, and Cruz, *supra* note 4, at 499–507, who mentions the change in the Board's authority to consider findings of fact within a much longer discussion about the other procedural reforms of the 2002 regulation.

12. *But see* John D. Ashcroft & Kris W. Kobach, *A More Perfect System: The 2002 Reforms of the Board of Immigration Appeals*, 58 DUKE L.J. 1991, 2009 (2009) (justifying the 2002 reforms, including the change to the Board's scope of review).

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*.<sup>13</sup>

The regulation does not define in detail the types of findings that should be construed as factual. Indeed, the only findings of fact specifically listed are credibility determinations. The inclusion of credibility determinations is not surprising, since it is a common assumption that a trier of fact's ability to see and hear testimony firsthand puts him or her in a unique position to gauge certain attributes of a witness's veracity.<sup>14</sup> For this reason, many rules expressly include credibility determinations when discussing the findings of fact that require deference from a reviewing body.<sup>15</sup>

More interesting, though, from a cursory review of the regulation, is what exactly is meant by the term *judgment*. While *questions of law* and *matters of discretion* are terms of art frequently employed in appellate procedure, the meaning of the term *judgment*, and how it is supposed to be applied in immigration cases, is not as clear.<sup>16</sup> However, the term *judgment* should be

13. 8 C.F.R. § 1003.1(d)(3) (2010). The scope-of-review regulation contains two additional clauses. The first of these additional clauses concerns appeals taken from decisions of "Service officers." *Id.* § 1003.1(d)(3)(iii). The second of these additional clauses prohibits the Board from engaging in factfinding "[e]xcept for taking administrative notice of commonly known facts such as current events or the contents of official documents . . . ." *Id.* § 1003.1(d)(3)(iv).

14. See *Jibril v. Gonzales*, 423 F.3d 1129, 1137 (9th Cir. 2005); *Chen v. U.S. Dep't of Justice*, 426 F.3d 104, 113 (2d Cir. 2005) ("We give particular deference to credibility determinations that are based on the adjudicator's observation of the applicant's demeanor, in recognition of the fact that the IJ's ability to observe the witness's demeanor places her in the best position to evaluate [credibility]."). *But cf.* *Mitondo v. Mukasey*, 523 F.3d 784, 788 (7th Cir. 2008) (drawing on empirical studies to conclude that "if you want to find a liar you should close your eyes and pay attention to *what* is said, not *how* it is said or what the witness looks like while saying it").

15. See, e.g., FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.>").

16. By noting the more frequent employment of *questions of law* and *matters of discretion*, I do not mean to imply that there is no ambiguity associated with how these terms are defined. Compare *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) (holding that the court has jurisdiction to review whether an asylum applicant established "changed circumstances" excusing an untimely filed application because such a finding concerns the "application of law to undisputed facts"), with *Zhu v. Gonzales*, 493 F.3d 588, 596 & n.31 (5th Cir. 2007) (rejecting the Ninth Circuit's analysis). However, the potential ambiguities in the application of these terms have been evaluated and discussed to a greater degree because their scope often impacts appellate courts' jurisdiction over a decision appealed from the Board. See 8 U.S.C. § 1252(a)(2)(B) (2006) (precluding judicial review over discretionary determinations); § 1252(a)(2)(C) (precluding review of petitions filed by certain criminal aliens); § 1252(a)(2)(D) (reinstating jurisdiction over questions of law and constitutional

defined, its parameters require juxtaposition to the question of what constitutes a finding of fact. For whatever it is that constitutes a judgment, it must be wholly distinguishable from findings of fact, since the regulation assigns a different standard of review to these two categories.<sup>17</sup>

In the supplemental information accompanying the regulation, the Attorney General expanded on some of these potential ambiguities.<sup>18</sup> Recognizing that asylum law represents “[o]ne of the more complicated contexts in which the clearly erroneous standard will be applied,” the commentary discussed how the standard would be applied in asylum cases to illustrate the distinction between questions of law, factual matters, and the elusive notion of judgments.<sup>19</sup> The Attorney General stated that the clearly erroneous standard would not apply to “judgments as to whether the facts established by a particular alien amount to ‘past persecution’ or a ‘well-founded fear of future persecution.’”<sup>20</sup>

From this statement, the Attorney General’s interpretation of the term *judgment* appears to take shape. A *judgment* would represent the Board’s determination of whether findings of fact meet the legal standard of conduct sufficiently severe to constitute persecution.<sup>21</sup> To illustrate, assume that an asylum applicant testified that, while she was in her home country, police beat her until she lost consciousness. Also assume that the immigration judge believed the applicant’s testimony that she was beaten until she lost consciousness, and credited a medical report that described

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issues).

17. An additional question that emerges concerns the catchall in clause (ii), which renders “all other issues” on appeal subject to de novo review. See 8 C.F.R. § 1003.1(d)(3)(ii). The Attorney General may have believed that there is a category of determinations that is neither factual, legal, discretionary, nor “judgmental.” However, it appears more likely that the explanation for this catchall is innocuous and that it was incorporated into the regulation to ensure that the Board retained its de novo authority for all decisions that are not construed as findings of fact.

18. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,878–900 (Aug. 26, 2002). Throughout this Article, the terms *commentary* and *supplemental information* will be used interchangeably to refer to the guidance published by the Attorney General in the *Federal Register* regarding the scope-of-review regulation.

19. *Id.* at 54,890. The commentary also provides an illustration of how the Board should approach the “exceptional and extremely unusual hardship” element in cancellation-of-removal cases. *Id.*; see 8 U.S.C. § 1229b(b)(1)(D).

20. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

21. For cases that address the level of harm required to establish persecution, see *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010), and *Guo v. Ashcroft*, 361 F.3d 1194, 1202–03 (9th Cir. 2004). For further information on asylum law generally, see 8 U.S.C. §§ 1101(a)(42), 1158.

the extent of the injuries she suffered. What if the immigration judge denied her asylum claim, holding that she failed to establish past persecution? Under the framework enunciated by the Attorney General, the Board would have de novo authority to determine, in its judgment, whether the harm the applicant suffered was sufficiently severe to constitute past persecution. Conversely, the Board would not have authority to review de novo the immigration judge's determination that police beat her until she lost consciousness.

The Attorney General, however, did not limit his use of the term *judgment* to the above statement. Subsequently in the supplemental information, he referred to judgments in his discussion of discretionary determinations, which creates the impression that he is using *matters of discretion* and *judgment* synonymously.<sup>22</sup> The Attorney General's references to *judgment* in multiple contexts leaves the precise meaning and contour of the term largely unsettled, and the supplemental information does not provide any additional insight.

The Attorney General's commentary explained more precisely the scope of the Board's review of discretionary determinations.<sup>23</sup> In such situations, where the agency is required to weigh the equities to determine whether an applicant is entitled to a discretionary form of relief from deportation, the Board still retains its authority to weigh the equities of a case de novo.<sup>24</sup> By contrast, the immigration judge is responsible for developing the record that would form the basis for an assessment of the equities, and the Board could only discount these underlying findings of fact under the clearly erroneous standard of review.<sup>25</sup> Thus, for example, the Board could decide de novo that an individual's past drug use is a substantial negative equity, but it may not review de novo whether the immigration judge correctly determined that this individual used drugs in the past.

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22. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

23. *Id.*

24. *Id.*

25. For examples of some of the frequent positive and negative equities found in a cancellation-of-removal case, see *United States v. Pallares-Galan*, 359 F.3d 1088, 1104 (9th Cir. 2004) (listing as negative equities the applicant's criminal convictions, and including within the discussion of positive equities the fact that the applicant had lived in the United States for a substantial number of years without leaving and his regular payment of taxes), and *Chum v. Attorney Gen.*, 371 F. App'x 334, 336 (3d Cir. 2010) (reviewing findings that the applicant had been "a member of a gang, had dropped out of high school, and had both an adult and juvenile criminal record," but that he also provided evidence "of rehabilitative potential, including earning his GED, having no problems while incarcerated, completing anger management and other prison rehabilitative-type courses, having no intention of returning to his gang, and pursuing a trade in the culinary arts").

In addition to discussing judgments and matters of discretion, the Attorney General also expanded on the parameters of factfinding in the scope-of-review regulation. The supplemental information states unequivocally that “[a] factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder.”<sup>26</sup> In this respect, the Attorney General applied to the Board a customary interpretation of how the clearly erroneous standard should be applied to findings of fact.<sup>27</sup>

Despite shortcomings in its review of judgments, the Attorney General’s supplementary information provided a helpful general framework to guide the Board’s application of the scope-of-review regulation. However, the Board’s application of the regulatory standards suffered from a number of deficiencies that will be explored in the next section.

## II. DEFICIENCIES IN THE BOARD’S INTERPRETATION OF THE SCOPE-OF-REVIEW REGULATION

The Board decisions that interpret its scope of review under the regulation are problematic for many reasons. The problems generally fall into one of two groups. The first group concerns deficiencies in the Board’s analysis itself and the reasoning it used to develop the parameters of its extensive de novo authority. The second group concerns instances where the Board fails to consistently define the scope of its review. Irrespective of the analysis employed, the fact that the Board decisions are both internally inconsistent and inconsistent with the Attorney General’s commentary is itself problematic. A review of the three precedential Board cases that addressed its scope of review will help flush out these two problem areas. It will also begin to show that interpreting the appropriate standard of review in immigration proceedings is more complicated and nuanced than a reading of the regulation might suggest. (The nuances will become even more readily apparent after a discussion of the courts of appeals’ decisions

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26. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

27. See, e.g., *Freeland v. Enodis Corp.*, 540 F.3d 721, 735 (7th Cir. 2008) (finding that even though “another court might weigh the evidence differently,” the bankruptcy court’s findings of fact warrant deference under the clearly erroneous standard of review); *Thomas v. Cnty. of L.A.*, 978 F.2d 504, 513 (9th Cir. 1993) (Orrick, J., concurring in part and dissenting in part) (chastising the majority for conducting a de novo review of district court findings of fact that should have been reviewed under a clearly erroneous standard); *In re Branding Iron Motel, Inc.*, 798 F.2d 396, 400 (10th Cir. 1986) (“When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently.”).



that have reviewed the scope-of-review regulation.)

A. *Framing the Board's Scope of Review: In re A-S-B- and In re V-K-*

1. *The A-S-B- Opinion*

Although the Attorney General issued the regulations that altered the Board's scope of review in 2002, the Board did not publish a precedential decision that interpreted the scope-of-review regulation until 2008, when it decided a pair of cases in tandem. The first of these cases was *In re A-S-B-*,<sup>28</sup> a case with a fairly straightforward set of facts. The case concerned a Guatemalan national who alleged that guerrillas approached him while he was working at a gas station and demanded that he provide them with free gas.<sup>29</sup> He claimed that the guerillas threatened him with kidnapping and forced recruitment if he refused to adhere to their demand.<sup>30</sup> After complying with the request of the guerillas, he departed Guatemala out of fear for his safety and applied for asylum in the United States.<sup>31</sup>

The immigration judge held that though the asylum applicant failed to establish past persecution, he did establish a well-founded fear of future persecution if deported to Guatemala.<sup>32</sup> The Board disagreed, finding that the applicant failed to establish a well-founded fear of persecution.<sup>33</sup>

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28. 24 I. & N. Dec. 493 (BIA 2008).

29. *Id.* at 493.

30. *Id.* at 494.

31. *Id.*

32. *Id.*

33. *Id.* at 498–99. Before the Board issued this precedential decision in 2008, the case weaved its way through the agency and courts for several years. At one point, it made its way to the U.S. Court of Appeals for the Ninth Circuit, where the government filed a motion asking the court to remand the case to the Board so that it could clarify how it applied its scope of review of the immigration judge's (IJ's) decision. *Id.* at 495. At first glance, it might appear peculiar that the government would ask the Ninth Circuit to remand so that the government could further clarify its prior decision. However, this has to do with the different government agencies involved in the adjudication of asylum cases throughout the various stages of litigation. Both the immigration judges and the Board are part of the Executive Office for Immigration Review (EOIR), which is a component of the Department of Justice. When an asylum case is within EOIR, the government is represented by an attorney from the Department of Homeland Security, in the branch of Immigration and Customs Enforcement. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441, 471, 116 Stat. 2135, 2192, 2205 (codified as amended at 6 U.S.C. §§ 251, 291 (2006)) (transferring the enforcement functions of the former Immigration Naturalization Services (INS) to the Department of Homeland Security (DHS)). If an asylum applicant appeals a decision of the Board, the case goes to the federal appeals court within the applicable venue. At this stage of the proceedings, the government is then represented by an

Reviewing the Attorney General's supplemental information to the regulation, the Board stated that the "clearly erroneous standard . . . does not apply to the application of legal standards, such as whether the facts established by an alien 'amount to past persecution or a well-founded fear of persecution.'"<sup>34</sup> The Board then discussed the parameters of its scope of review as it pertained to the incidents described by the asylum applicant, stating that "whether these uncontested facts were sufficient to establish a well-founded fear of persecution . . . was a legal determination that was not subject to the clearly erroneous standard of review."<sup>35</sup> The opinion thus made clear that the question of whether an uncontested set of facts constitutes a well-founded fear of persecution is a "matter of law."<sup>36</sup> The Board then discussed how it would go about determining if an applicant established persecution as a matter of law. The Board stated that it was "entitled to weigh the evidence in a manner different from that accorded by the Immigration Judge . . . ." <sup>37</sup>

Applying this analytical framework to the facts of the case, the Board held that the immigration judge erred because his determination that the applicant established a well-founded fear of persecution was based on "speculative findings about what may or may not occur to the respondent in the future."<sup>38</sup> According to the Board, such a finding did not amount to factfinding because "it is impossible to declare as 'fact' things that have not yet occurred."<sup>39</sup>

## 2. *Leaving Judgments Undefined*

There is a noticeable absence in the Board's analysis of any mention of the term *judgment*, let alone the role that judgments play in the Board's authority to exert de novo review over a matter before it. Instead, the Board simply characterizes its persecution finding as a matter of law because it does not constitute factfinding.<sup>40</sup> Consequently, the opinion does

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attorney in the Office of Immigration Litigation, a component of the Civil Division in the Department of Justice. See *Office of Immigration Litigation—Appellate Section*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/civil/oil/OIL\\_Appellate\\_Section.htm](http://www.justice.gov/civil/oil/OIL_Appellate_Section.htm) (last visited May 11, 2011).

34. *In re A-S-B-*, 24 I. & N. Dec. at 496 (quoting Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 57,890 (Aug. 26, 2002)).

35. *Id.* at 497.

36. *Id.* (citing *Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1194 (9th Cir. 2005)).

37. *Id.*

38. *Id.* at 498.

39. *Id.* (citation omitted).

40. See *id.* at 497–98.

nothing to explain how the term *judgment* fits into its scope of review, even though the Attorney General stated in his commentary that the Board has *de novo* authority to render “judgments as to whether the facts established by a particular alien amount to . . . persecution.”<sup>41</sup> If anything, the Board’s opinion seems to nullify a central aspect of the term by failing to discuss any role it plays in deciding a persecution claim.

### 3. *Factual Inquiries and Future Events*

Perhaps the most curious aspect of the Board’s analysis in *In re A-S-B-* is its contention that events that have not yet occurred cannot be considered facts. In asylum cases, the entire premise of applicants’ claims is that they cannot return to their home countries because they will face persecution.<sup>42</sup> *A fortiori*, the crux of any asylum claim is the need for an adjudicator to render an opinion about the likelihood of certain events taking place in the future.<sup>43</sup> For whatever reason the Board decided to define facts more narrowly than the Attorney General, the Board’s analysis on this point, even on its face, gives cause for greater scrutiny.

There are numerous examples of factfinding taking place in situations where a specific event in question has not yet occurred.<sup>44</sup> For example, in an assessment of the damages due in a tort action, a factfinder is regularly required to assess a plaintiff’s future medical expenses on the basis of long-term medical ailments that, to a degree of probability but not certainty, may afflict the plaintiff years down the road.<sup>45</sup> The fact that the long-term

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41. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 57,890 (Aug. 26, 2002) (internal quotation marks omitted).

42. There is an exception to this general rule. An immigration judge may grant asylum to an applicant who has not established a well-founded fear of persecution on account of a protected ground if there are “compelling reasons for” the applicant “being unwilling or unable to return to the country arising out of the severity of the past persecution” or if “there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.” 8 C.F.R. § 1208.13(b)(1)(iii) (2010).

43. However, an applicant who establishes past persecution is entitled to a rebuttable presumption that he or she has a well-founded fear of persecution. *See id.* § 1208.13(b)(1); *see also* Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004) (reviewing the two ways in which an applicant can establish that he or she is entitled to asylum protection).

44. *See, e.g.*, United States v. Stewart, 452 F.3d 266, 273–74 (3d Cir. 2006) (likelihood that prisoner released for reasons of insanity will be a threat to society); Onishea v. Hopper, 171 F.3d 1289, 1300–01 (11th Cir. 1999) (en banc) (likelihood of future prison violence).

45. *See, e.g.*, Auto-Owners Ins. Co. v. Tompkins, 651 So. 2d 89, 90 (Fla. 1995) (stating that a recovery of future medical expenses requires a showing that such expenses are “reasonably certain to occur”); McDaniel v. Carencro Lions Club, 934 So. 2d 945, 977 (La. Ct. App. 2006) (“[The plaintiff] must show that, more probably than not, these [medical] expenses will be incurred and must present medical testimony that they are indicated and

effects of such medical ailments have not yet materialized does not transform the role of the jury beyond that of a factfinder.

One could argue that the factfinder in the above example, like the Board in *In re A-S-B-*, is simply required to make a judgment about the probability of future events based on the evidence before it. Perhaps, then, the parameters of judgments in the scope-of-review regulation provide the Board with de novo authority to assess the likelihood of future events. However, because the Board in *In re A-S-B-* did not attempt to make such an argument, its broad pronouncement on the types of events that will never be considered “facts” does not appear correct. (The analytical failing of the Board’s beliefs about predictions not involving factfinding will be discussed *infra* in greater detail after the problem is further illustrated by the Board’s decision in *In re H-L-H-*.)

With such a far-reaching pronouncement made by the Board on the meaning of factfinding, it is helpful to examine what exactly the Board cited to support this statement. In *In re A-S-B-*, the Board drew support through a comparison to the Second Circuit’s decision in *Huang v. INS*.<sup>46</sup> *Huang* concerned an asylum applicant from China who claimed he would be sterilized if deported to his home country.<sup>47</sup> Affirming the Board, the Second Circuit held that the absence of evidence showing that the applicant would be sterilized rendered his claim “speculative at best.”<sup>48</sup>

Unfortunately, *Huang* does not provide the Board with any support for its belief that an assessment of possible future occurrences will never involve factfinding. To the contrary, the Second Circuit reviewed the Board’s holding, including the question of whether the applicant established a well-founded fear of future persecution, under the substantial evidence standard. Substantial evidence is the standard of review that the appellate courts apply to “the factual findings underlying the [Board’s] determinations.”<sup>49</sup>

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the probable cost of these expenses.”); *Pilgrim’s Pride Corp. v. Smoak*, 134 S.W.3d 880, 905 (Tex. App. 2004) (“The jury can determine the amount of probable future medical expenses based on the nature and course of the injuries or disability, the medical care rendered before trial, past medical expenses, and the condition of the injured party at the time of trial.”); *cf.* *Kaplun v. Attorney Gen.*, 602 F.3d 260, 270 (3d Cir. 2010) (stating that if the jury believes expert testimony about injuries, disability, and physical suffering, it is making a “factual finding” as to future pain and suffering). The *Kaplun* decision will be discussed in greater detail *infra* Part III.C.

46. *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008) (citing *Huang v. INS*, 421 F.3d 125, 129 (2d Cir. 2005)).

47. *Huang*, 421 F.3d at 127.

48. *Id.* at 129.

49. *Id.* at 128 (internal quotation marks omitted); *see also* 8 U.S.C. § 1252(b)(4)(B) (2006) (stating “the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary”).

Thus, if anything, *Huang* contradicts the Board's interpretation of factfinding.

#### 4. *The V-K- Opinion*

The Board issued *In re V-K-* on the same day as *In re A-S-B-*, but the analysis employed in *In re V-K-* is noticeably different.<sup>50</sup> Although *In re V-K-* concerned a claim under the regulations implementing the Convention Against Torture (CAT)<sup>51</sup> rather than asylum, the same basic analytical framework should apply. In CAT claims, the applicant must establish that the harm he or she will suffer amounts to torture,<sup>52</sup> and in asylum claims, the applicant must prove that the harm he or she will suffer amounts to persecution.<sup>53</sup> But the success of either claim is based on whether applicants can establish, to a delineated level of certainty, that they will face the requisite harm if returned to their home country.<sup>54</sup> Thus, both claims involve an assessment of the likelihood that certain events will occur in the future.

*In re V-K-* concerned a Jewish national of the former Soviet Union.<sup>55</sup> The immigration judge found that the applicant more likely than not would be tortured if returned to Ukraine.<sup>56</sup> The Board disagreed.<sup>57</sup> Like the *In re*

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50. *In re V-K-*, 24 I. & N. Dec. 500 (BIA 2008). It should be noted that different Board members issued the opinions.

51. See 8 C.F.R. §§ 1208.16–1208.18 (2010); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51, 1465 U.N.T.S. 113, at 197 (Dec. 10, 1984); Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note (b)) (authorizing the Attorney General to prescribe regulations that ensure aliens are not deported if they are likely to face torture in their home country).

52. See 8 C.F.R. § 1208.16(c)(2); *id.* § 1208.18(a) (defining torture).

53. See 8 U.S.C. § 1101(a)(42); 8 C.F.R. § 1208.13(b).

54. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (commenting on the possibility of establishing a well-founded fear of persecution on the basis of a ten percent chance that the alleged harm would occur in the future); 8 C.F.R. § 1208.16(c)(2) (stating that an applicant under CAT must establish that he or she “more likely than not” would be tortured if returned to his or her home country).

55. *In re V-K-*, 24 I. & N. Dec. at 500–01.

56. See *id.* at 501.

57. As with *In re A-S-B-*, this case also had a longer procedural history. The Board originally vacated the decision of the immigration judge, finding that he relied on the wrong conviction record. See *Kaplun v. Attorney Gen.*, 602 F.3d 260, 263 (3d Cir. 2010) (reviewing the procedural history of *In re V-K-*). When the case again came before the Board, the Board issued an order of removal, and the alien petitioned the Third Circuit for review of that decision. *Id.* at 264. After the Board denied a motion to reopen, the alien petitioned the Third Circuit for review of that decision as well, and the case was

*A-S-B-* decision, the Board noted that it does “not consider a prediction of the probability of future torture to be a ruling of fact.”<sup>58</sup> However, the Board offered greater clarification of what it meant and why it believed its determination conformed to the Attorney General’s commentary accompanying the regulation. The Board stated that “predictions of future events may in part be derived from facts,” but the predictions do not concern the *type* of factfinding that the regulation prohibits it from reviewing *de novo*.<sup>59</sup> Thus, the Board sought to clarify the distinction between factfinding *per se*, and factfinding as that term is to be applied in the context of the scope-of-review regulation.

The Board then noted that its interpretation was consistent with the Attorney General’s commentary accompanying the regulation, and that its *de novo* authority included “*judgments* as to whether the facts established by a particular alien amount to” persecution, and by analogical extension, the requisite likelihood of torture.<sup>60</sup> The judgment void prominently on display in *In re A-S-B-* is filled here. According to *In re V-K-*, a “question of judgment” refers to whether the established facts meet “the ultimate statutory requirement.”<sup>61</sup>

##### 5. *Reconciling A-S-B- and V-K-*

The analytical framework in *In re V-K-* appears more well-grounded than that employed by the Board in *In re A-S-B-*. Unlike *In re A-S-B-*, *In re V-K-* does not assert in conclusory fashion that “it is impossible to declare as ‘fact’ things that have not yet occurred.”<sup>62</sup> Rather, it delves deeper into the distinction between factfinding and judgments, attempting to separate the two terms as they are to be applied under the scope-of-review regulation. Nevertheless, *In re V-K-* still leaves the parameters of judgments largely undefined, perhaps necessarily so, since the straightforward facts of the case did not require it to dig deeper.<sup>63</sup>

Irrespective of which opinion employed a better analytical framework in its assessment of the scope-of-review regulation, the fact remains that their modes of analysis diverged in certain respects. This divergence, in and of

subsequently remanded to the Board. *Id.* The Board then issued another decision that is the precedential decision being discussed here. *Id.* at 264–65.

58. *In re V-K-*, 24 I. & N. Dec. at 501 (internal quotation marks omitted).

59. *Id.* (internal quotation marks omitted).

60. *Id.* at 501–02 (emphasis added); *see also* 8 C.F.R. § 1208.16(c)(2) (2010) (setting forth the requisite probability of torture that an applicant must establish).

61. *In re V-K-*, 24 I. & N. Dec. at 502 (internal quotation marks omitted).

62. *See In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008).

63. But *see Kaplun v. Attorney General*, 602 F.3d 260 (3d Cir. 2010), discussed *infra* Part III.C, which does fault the Board for insufficiently dissecting the facts of the case.

itself, is problematic because it means that even after six years, the Board has yet to come up with a uniform understanding of its scope-of-review regulation. If the Board cannot even agree internally on a uniform way to speak about the framework of its scope of review, then how can it be expected to apply such standards consistently? The next section addresses some of the key problems that became apparent when the Board subsequently applied the enunciated standards of its scope of review to a fact-intensive case.

### B. *In re H-L-H- and Weighing the Evidence*

The case of *In re H-L-H-*, issued in March 2010, is the first precedential decision in which the Board applied its scope-of-review standards to a fact-intensive case.<sup>64</sup> The opinion focused on whether the reweighing of evidence (e.g., testimony, documents, and official reports) in a persecution assessment constituted factfinding. When considered in the abstract, the Board's evidence-based prediction can be seen intuitively as a question of judgment subject to *de novo* review. But the question becomes *how*, exactly, the Board evaluates the evidence and determines whether it may afford different weight to previously rendered findings of fact. At what point does an assessment of the record turn into a reevaluation of facts such that the Board's framework breaks down, and its analysis becomes nothing more than ordinary factfinding under the scope-of-review regulation? A discussion of *In re H-L-H-* will help explore this question.

#### 1. *The H-L-H- Opinion*

*In re H-L-H-* concerned a common factual circumstance that confronts immigration adjudicators. The asylum applicant traveled to the United States from China, gave birth to two children while she was here, and then claimed that if immigration officials deported her the Chinese government would force her to undergo a sterilization procedure because she violated the country's population control policies.<sup>65</sup> At her asylum hearing, the applicant submitted documents from the family planning office of her home village, as well as from friends and family members, stating that she would

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64. 25 I. & N. Dec. 209 (BIA 2010).

65. *Id.* at 210. China's population control policies have evolved over time. Generally speaking, Chinese citizens are only permitted to have one child unless they satisfy additional criteria. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEPT OF STATE, 2009 HUMAN RIGHTS REPORT: CHINA § 1(f) (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/135989.htm> (stating that couples are generally permitted to have a second child if neither parent had any siblings).

be forced to undergo a sterilization procedure if returned to China.<sup>66</sup>

The immigration judge found the applicant credible and determined that she was entitled to asylum relief, having held that she established an objectively reasonable fear of persecution—i.e., that she would be sterilized.<sup>67</sup> The Board reversed the immigration judge's holding.<sup>68</sup> The Board first reiterated its pronouncement in *In re A-S-B-* that “predict[ion of] future events” does not amount to factfinding.<sup>69</sup> Reviewing the scope of its authority under the regulation, the Board first noted that to determine “whether specific facts are sufficient to meet a legal standard such as ‘well-founded fear,’ the Board has authority to give different weight to the evidence from that given by the Immigration Judge.”<sup>70</sup> The Board labeled this authority as “critical” so that it could reevaluate evidence that is “anecdotal” or “subjective” against other evidence that it presumed to be more reliable.<sup>71</sup> In this case, the presumptively more reliable evidence was an official report issued by the Department of State that found, *inter alia*, that the Chinese government did not have an official policy of forcing returning Chinese to undergo a sterilization procedure.<sup>72</sup> The Board determined that the documents the applicant submitted from the local family planning office were “entitled to minimal weight” because they were unauthenticated and obtained for the purpose of the applicant's asylum hearing.<sup>73</sup> Likewise, the Board found that the letters from friends and family that she submitted were not entitled to significant weight because the authors of these letters were “interested witnesses who were not subject to cross-examination.”<sup>74</sup>

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66. *In re H-L-H-*, 25 I. & N. Dec. at 210, 214–15.

67. *Id.* at 210. The immigration judge also found that the applicant failed to establish that any monetary sanctions levied against her would amount to persecution. *Id.* at 211, 215, 216–17; *see also* *Li v. Attorney Gen.*, 400 F.3d 157, 165–66 (3d Cir. 2005) (discussing when the economic deprivation experienced by an applicant is severe enough to warrant a finding of persecution). However, because the framework of the analysis by the Board for both issues is similar, for the sake of brevity this discussion will only address the sterilization issue to highlight the analytical problems in the case.

68. *In re H-L-H-*, 25 I. & N. Dec. at 213.

69. *Id.* at 212.

70. *Id.* (citing *In re A-S-B-*, 24 I. & N. Dec. 493, 497 (BIA 2008)).

71. *Id.*

72. *Id.* at 213–14 (quoting BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, CHINA: PROFILE OF ASYLUM CLAIMS AND COUNTRY CONDITIONS 29 (2007)).

73. *Id.* at 214.

74. *Id.* at 215.



## 2. *Weighing the Evidence and the Attorney General's Supplementary Information*

The Board's decision brings to bear the threshold question of whether the Board is correctly reading the scope of its authority as defined by the Attorney General in the commentary accompanying the regulation. The commentary contains two references to weight of the evidence. In the first reference, the Attorney General explained that "factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder."<sup>75</sup> By this pronouncement, it would seem clear that reweighing evidence is not supposed to be within the Board's scope of authority.

In the Attorney General's second mention of weighing of the evidence, the commentary states that "'discretion,' or judgment, exercised based on . . . findings of fact, and the weight accorded to individual factors, may be reviewed by the Board *de novo*."<sup>76</sup> At first glance, this pronouncement might appear to interpret the regulation in consonance with the Board *if* the Board consistently interpreted the term judgment to mean that which it stated in *In re V-K*.<sup>77</sup> However, the context of the Attorney General's comment makes clear that this statement was not referring to judgments as the ultimate determination of whether an applicant met a statutory standard on the basis of factual findings. Rather, the Attorney General was discussing the Board's authority to reweigh the evidence in the context of a discretionary determination.<sup>78</sup> In this context, the Attorney General's statement simply refers to the Board's authority to weigh the importance of any one *factor* when determining whether an applicant is entitled to a grant of relief from deportation as a matter of discretion.

To illustrate, assume that an applicant for cancellation of removal is statutorily eligible for that form of relief, and the only question is whether she is entitled to cancellation as a matter of agency discretion.<sup>79</sup> Assume

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75. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

76. *Id.* at 54,890.

77. See *In re V-K*, 24 I. & N. Dec. 500, 501–02 (BIA 2008) (defining the term *judgment* as whether the established facts meet "the ultimate statutory requirement"). As noted before, the Board's decision in *In re A-S-B* did not address the meaning of judgments. See *In re A-S-B*, 24 I. & N. Dec. 493 (BIA 2008).

78. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

79. The statutory requirements for cancellation of removal are codified at 8 U.S.C. § 1229b (2006). Section 1229b(a) lists the requisite elements for an applicant who is a lawful permanent resident. Section 1229b(b) lists the requisite elements for applicants who are "nonpermanent residents." However, the statute specifies that applicants "may" be granted cancellation of removal if they satisfy the statutory standards. *Id.* § 1229b(a), (b)(1); see also *id.*

also that she submitted evidence that she had paid her taxes every year and engaged in frequent community service to establish that her circumstances warrant a discretionary grant of cancellation. In determining whether to grant the applicant cancellation of removal as a matter of discretion, the Board is entitled to consider de novo how much weight her good deeds are entitled to, in relation to other evidence of record, such as any criminal record.<sup>80</sup> In this light, the Attorney General's use of the word *judgment* in the commentary simply appears to be an extraneous addition to a discussion of situations that are actually limited to matters of discretion. Accordingly, the Attorney General's second mention of the term *judgment* does not support the Board's determination that it may reweigh findings of fact.<sup>81</sup>

From these two comments, there is no express language authorizing the Board to reweigh findings of fact. But putting aside the question of whether the Board's reasoning comports with the Attorney General's interpretation of the regulation as stated in the commentary, the framework established by the Board suffers from several additional shortcomings.

### 3. *Weighing the Evidence in Forward-Looking Determinations*

The first shortcoming concerns how the Board analyzes the evidence before it to render a de novo assessment of the ultimate determination of whether an applicant established a sufficient likelihood of a future event—for example, a well-founded fear of future persecution in an asylum case. As noted in *In re A-S-B-* and reaffirmed in *In re H-L-H-*, the Board does not think its prediction of the likelihood of future events constitutes factfinding.<sup>82</sup> Under this reasoning, it would then follow that the Board's reweighing of the evidence to determine the likelihood of a future event cannot be considered factfinding. After all, if the prediction itself is not factfinding, then certainly the means used by the Board to make the prediction cannot constitute factfinding.

The problem with the Board's reasoning is that its premise is flawed. As noted above, immigration judges do engage in factfinding to determine whether an applicant has established that a future event will occur to a

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§ 1252(a)(2)(B) (listing cancellation-of-removal applications denied as a matter of discretion as among the agency determinations that the courts of appeals lack jurisdiction to review).

80. See generally *In re C-V-T-*, 22 I. & N. Dec. 7, 10–12 (BIA 1998) (discussing the framework the Board must follow in its assessment of whether an applicant is entitled to a discretionary grant of cancellation of removal).

81. See *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010) (holding that “the Board has authority to give different weight to the evidence [than] that given by the Immigration Judge” when determining “whether specific facts are sufficient to meet a legal standard”).

82. *Id.* at 212; *In re A-S-B-*, 24 I. & N. Dec. at 498.

prescribed level of certainty. It is not sufficient for the Board to say that such predictions about the likelihood of future events are simply not factfinding because they require “speculative findings about what may or may not occur . . . in the future.”<sup>83</sup> Speculation is a term used to describe a finding of fact that is not grounded in record evidence or subject to *reasonable* inference. As one commenter has observed, “all fact finding involves a continuous chain of inference so that the finding of basic facts itself is the drawing of an inference.”<sup>84</sup> Thus, the act of rendering a predictive decision on the basis of inferences drawn from the facts of the case necessarily involves factfinding.

To a certain extent, inferences used to predict the likelihood of future events will necessarily involve some level of speculation. The speculative aspects of the inferences become unreasonable when the speculation can be construed as “bald.”<sup>85</sup> As the Second Circuit explained, “The speculation that inheres in inference is not ‘bald’ if the inference is made available to the factfinder by record facts, or even a single fact, viewed in the light of common sense and ordinary experience.”<sup>86</sup> Thus, bald speculation merely refers to a specific type of factfinding, i.e., inferences that are not reasonable. However, the fact that an inference is not reasonable does not somehow alter the mode of analysis employed by the immigration judge when he or she made the inferential determination in question. It still remains a finding of fact, even if a reviewing body determines that the immigration judge erred in reaching that finding. If we assume that the Board has legitimately determined that a factual finding of the immigration judge is speculative, then the Board could simply overrule that finding under its clearly erroneous standard of review for factual findings.<sup>87</sup> But the fact that forward-looking determinations involve predictions, and hence a certain amount of speculation, does not itself create a basis for claiming that such determinations are not factfinding.

A review of the facts from *In re H-L-H-* will help to illustrate this point. Let us divide the germane evidence into two groups. In the first group, we have the letters from friends and family attesting to China’s population-control policies and documentation that relays the opinion of the local family planning office that the applicant would need to be sterilized.<sup>88</sup> In the second group, we have Department of State country reports stating that

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83. *In re A-S-B-*, 24 I. & N. Dec. at 498.

84. Louis L. Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record,”* 64 HARV. L. REV. 1233, 1242 (1951).

85. *See* *Siewe v. Gonzales*, 480 F.3d 160, 168–69 (2d Cir. 2007).

86. *Id.*

87. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2010).

88. *In re H-L-H-*, 25 I. & N. Dec. 209, 210, 214–15 (BIA 2010).

it has found no evidence that individuals returned to China are forced to undergo sterilization procedures.<sup>89</sup> The immigration judge gave the first group of evidence high probative value while the Board believed that the second group was more important.<sup>90</sup> In finding group one highly probative, the immigration judge made several possible inferences, such as the inference that a family planning office that says it will sterilize an applicant will, in fact, sterilize her if she is deported to China. That is not to say that such an inference is correct, but a reviewing body could reasonably characterize it as being grounded in the record evidence that the immigration judge was tasked to assess.

Moving on to the second group, the Board assumed that if the Department of State report mitigated the likelihood that sterilization would take place, then it is reasonable to infer that the applicant would not be sterilized (or at least that the probability of sterilization was sufficiently minimal).<sup>91</sup> The Board also inferred that unsigned reports and documents created by individuals who are unavailable for cross-examination are not entitled to significant weight.<sup>92</sup> Although the Board's holding may be reasonable, the pertinent issue becomes how the Board must engage in its analysis in light of the scope-of-review regulation. This is where the analysis gets more intricate, and the fine line between factfinding and judgments takes shape.

It would appear permissible for the Board to determine that the evidence did not support the immigration judge's well-founded fear of persecution finding if one of two modes of analysis occurred. First, the Board would have to accept the inferences that formed the basis of the immigration judge's opinion. That is to say, if the Board accepted the inferences—i.e., findings of fact of the immigration judge—but still determined in its judgment that the evidence did not support the contention that the applicant established a well-founded fear of persecution, then the Board could reverse the immigration judge's holding on the basis of its *de novo* authority.<sup>93</sup> Second, the Board could determine that the inferences drawn by the immigration judge were neither grounded in the record nor reasonable, thus rendering the immigration judge's findings of fact clearly erroneous.<sup>94</sup> However, where the Board went wrong was substituting its

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89. *Id.* at 213–15.

90. *Id.* at 210, 213–14.

91. *See id.* at 213–14.

92. *Id.* at 214–15.

93. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2010).

94. *See id.* § 1003.1(d)(3)(i). For example, assume that the letter from the family planning office submitted by the applicant was actually from an office located fifty miles away from the applicant's hometown. Since population control policies are believed to

own inferences for those of the immigration judge to minimize the probative value of several pieces of evidence.<sup>95</sup> In short, the Board's mistake was to reweigh the probative value of the evidence in contravention of its scope of review.

#### 4. *Weighing the Evidence in Determinations About Facts that Have Already Occurred*

In addition to how the Board analyzes factual findings regarding future events, a second shortcoming in its analysis concerns how it would review events that have already happened. Tweaking the facts of *In re H-L-H-* will help to illustrate this point. Assume that the asylum applicant claimed that she *already* was sterilized in China and that she subsequently fled to the United States because of this treatment. When she appeared before an immigration judge at her asylum hearing, the applicant's testimony on her own behalf was particularly brief, lasting no more than two or three minutes. In her testimony, the applicant said nothing contradictory, nor did she provide any other indicia of untruthfulness that would warrant a finding by the immigration judge that she was not credible.<sup>96</sup> However, even though the applicant did not contradict herself, because her testimony was scant, the immigration judge determined that she must submit corroborating evidence in order for her to sustain her burden of proving that she was persecuted in the past.<sup>97</sup> Complying with this request, she

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diverge among different localities, see *In re J-H-S-*, 24 I. & N. Dec. 196, 199 (BIA 2007), the letter submitted by the applicant would not be particularly probative of the likelihood that authorities would sterilize her if she returned to *her* hometown. If the immigration judge based his determination regarding the likelihood of sterilization on this letter, then it would be reasonable to label the inference drawn from this letter as unreasonably speculative.

95. Either mode of analysis may also lead to a third option. Even if the immigration judge's findings are reasonably grounded in the record, a review of the entirety of the administrative record might demonstrate that the immigration judge did not consider or explain sufficiently probative evidence that would tend to contradict his or her assessment. In that case, the Board could decide to remand the case for further factfinding instead of overruling the opinion itself. See 8 C.F.R. § 1003.1(d)(3)(iv); cf. *infra* Part III.A (discussing whether the Board has authority to consider evidence of record that the immigration judge did not consider or use to support his or her holding).

96. For further information on credibility determinations in immigration proceedings, see Scott Rempell, *Credibility Assessments and the REAL ID Act's Amendments to Immigration Law*, 44 TEX. INT'L L.J. 185 (2008), which reviews the shortcomings in an applicant's testimony that support an adverse credibility determination, including inconsistent testimony, omissions from an asylum application, implausible testimony, and an applicant's demeanor.

97. See 8 U.S.C. § 1158(b)(1)(B)(ii) (2006) ("Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."); see also 8 C.F.R. § 1208.13(a) (stating that an asylum applicant bears the burden of proof).

submitted several documents to corroborate her prior residence in her hometown in China, a letter from the family planning office that required her to show up for a bimonthly gynecological examination, and hospital records that showed she underwent a medical procedure, although the records did not specify the type of medical procedure.<sup>98</sup>

Evaluating the evidence, the immigration judge infers from the testimony and submitted exhibits that the medical procedure the applicant underwent was a forced sterilization procedure and holds that the applicant established past persecution. What if the Board disagrees with the immigration judge? The answer would depend on the nature of the disagreement. If the Board does not think that the applicant established past persecution on the basis of a forced sterilization procedure, then this would be a permissible—but incorrect<sup>99</sup>—finding within its scope-of-review authority. Indeed, it would simply be the Board evaluating the uncontested evidence of record as established by the immigration judge and determining *de novo* that the applicant failed to satisfy the ultimate statutory standard for past persecution.<sup>100</sup>

In contrast, what if the Board disagrees with the immigration judge's determination that the applicant provided evidence sufficient to establish that she was forcibly sterilized? Perhaps the Board thought it was unclear why the applicant underwent a medical procedure and what the procedure was for.<sup>101</sup> And, consequently, the Board decided that the medical

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98. *See generally* Pan v. Mukasey, 260 F. App'x 387, 389 (2d Cir. 2008) (finding that a required gynecological examination, without more, does not amount to past persecution).

99. *See* 8 U.S.C. § 1101(a)(42) (2010) (“a person who has been forced to abort a pregnancy or to undergo involuntary sterilization . . . shall be deemed to have been persecuted on account of political opinion”); *see also* Lin v. U.S. Dep't of Justice, 494 F.3d 296, 309–10 (2d Cir. 2007) (en banc) (finding that spouses of individuals who have been sterilized are not entitled to a finding of *per se* past persecution).

100. Consequently, the Board's decision would be permissible under 8 C.F.R. § 1003.1(d)(3)(ii). *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002).

101. Such a scenario raises an interesting question about the scope of the Board's authority when reviewing a decision of the immigration judge in which no adverse credibility determination is made. Under 8 U.S.C. § 1158(b)(1)(B)(iii), “if no adverse credibility determination is explicitly made [by the immigration judge], the applicant or witness shall have a rebuttable presumption of credibility on appeal.” Since the Board does not have *de novo* authority to review credibility determinations, it remains to be seen how, exactly, the presumption of credibility could be rebutted. Must the Board accept the applicant's scant testimony in which she indicated that she was sterilized? If not, how can a contrary finding be squared with the rebuttable presumption in the statute? One potential answer is to assume that a finding of credibility does not necessarily mean that the testimony of the applicant should be considered “gospel truth.” *See* Kumar v. Gonzales, 444 F.3d 1043, 1060 (9th Cir. 2006) (Kozinski, J., dissenting). In other words, even if there is no

documentation was not entitled to significant probative value. This would be an example where the Board would be reweighing the probative value of the evidence presented during the asylum hearing in contravention of the scope-of-review regulation. For if the immigration judge reasonably inferred that the medical procedure was for a forced sterilization (and we are assuming for purposes of this hypothetical that the inference was reasonable), then there would be no way for the Board to hold that this finding was clearly erroneous. However, according to the Board's reasoning discussed above, reweighing of the evidence falls within the scope of its de novo authority.<sup>102</sup>

Although the Board has never stated explicitly that its authority to reweigh evidence of record is limited to forward-looking matters, the cases in which it asserted de novo authority to reweigh evidence concerned forward-looking issues such as a well-founded fear of persecution.<sup>103</sup> Irrespective of whether the Board believes its authority to reweigh evidence extends to established past facts, this analysis has shown that reweighing evidence de novo is not permitted under the scope-of-review regulation for any factual finding rendered by an immigration judge, whether it concerns past or future events. The only difference between past and future factfinding is that a factual finding that concerns future events includes a greater degree of inferential factfinding—and hence speculation.<sup>104</sup> What is apparent, though, is that the basic analytical framework the Board applies when weighing evidence does not comport to the factfinding parameters laid out in the scope-of-review regulation.<sup>105</sup>

##### 5. *Using the Ultimate Holding as a Justification to Reweigh Evidence*

The discussion above has shown that the Board is incorrect in justifying its authority to reweigh evidence in forward-looking assessments on the basis of its mistaken belief that determinations concerning future events cannot concern facts. In *In re H-L-H-*, the Board provided an additional rationale to justify its interpretation of its authority to reweigh evidence of

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definable basis in the record for finding that an applicant is not credible, every word of the applicant's testimony need not be credited on appeal in every circumstance. An additional possibility would be that the statute trumps the inconsistent language in the regulation in this instance.

102. See *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010).

103. See *id.*; *In re A-S-B-*, 24 I. & N. Dec. 493, 497 (BIA 2008).

104. There is also a potentially separate assessment of the *probability* of a future event occurring that is not present in an analysis of past events. That issue will be taken up in Part III.C, *infra*.

105. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

record. This additional justification warrants mentioning because it further demonstrates the critical failings in the way in which the Board has interpreted its scope of review. To paraphrase, the Board stated that *de novo* authority to reweigh evidence is critical to ensure that an immigration judge does not erroneously rely on “anecdotal and subjective evidence” to determine that an applicant has established a well-founded fear of persecution.<sup>106</sup>

Setting aside the fact that the Board can still review such perceived shortcomings under the clearly erroneous standard,<sup>107</sup> the problem with the Board’s rationale is that it is using the ends to justify the means. Essentially, the Board is asserting that it needs greater authority to overrule an immigration judge’s decision because it may not agree with that decision on the basis of its assessment of the probative value of certain pieces of evidence. But the importance of correcting decisions believed to be wrong is not the issue here; the issue is whether the Board has authority to do it. And if a regulation limits that authority out of a desire to ensure that two levels of decisionmakers do not separately weigh the probative value of the exhibits submitted during a hearing,<sup>108</sup> then the Board’s desire to make what it believes to be the correct decision cannot subjugate this stated purpose of the regulation.

### C. *A Scope of Review in Disarray*

Even before the Board issued any precedential decisions interpreting the new scope-of-review regulation, the Attorney General recognized that the changes to the Board’s scope of review would require a more careful mode of analysis by the Board.<sup>109</sup> In the precedential cases issued by the Board that have assessed the parameters of its scope of review under the 2002 regulation, the Board has not provided a consistent interpretation of these regulations. The Board has also failed to consistently apply the general framework enunciated by the Attorney General, including the question of what constitutes a judgment.

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106. *In re H-L-H-*, 25 I. & N. Dec. at 212.

107. *See* 8 C.F.R. § 1003.1(d)(3)(i) (2010).

108. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (“The parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one and requiring them to persuade . . . more judges at the appellate level is requiring too much. The clearly erroneous standard of review recognizes that an evidentiary hearing on the merits should be the main event rather than a tryout on the road.” (internal quotation marks, alterations, and citations omitted)).

109. *Id.* at 54,890 (acknowledging that a “more refined analytical approach to deciding cases” would be required of the Board).



Beyond these general problems, Part II of this Article has identified at least two specific areas where the Board's analysis has gone particularly astray. The first is the Board's blanket assertion that things that have not yet occurred cannot be considered facts.<sup>110</sup> The second is the Board's conclusion that it has de novo authority to reweigh evidence of record.<sup>111</sup> In addition to being contrary to the express wording of the Attorney General's commentary,<sup>112</sup> this conclusion appears to contradict the Board's earlier precedential cases that held that it does not have authority to reweigh evidence.<sup>113</sup>

The Board's rule on prospective factfinding is tethered to neither the plain meaning of the scope-of-review regulation and the Attorney General's commentary accompanying it, nor to any of its own precedential decisions. Rather, it is a rule that the Board could have just as easily made in any context before the Attorney General promulgated the scope-of-review regulation. And regardless of whether the Board's pronouncement on prospective factfinding is tied to the regulation or not, it still suffers from the same analytical failings.

All of these shortcomings in the Board's holdings beg the question of just how much the Board is at fault for its flawed analyses and whether the complexity of the issues at hand have played a role in the development of the case law that now governs the Board's scope of review. If the complexity of the regulation as applied to the adjudication of immigration cases is minimal, then reform efforts should be directed predominantly at the Board. Conversely, if a significant amount of the confusion is based on the application of the regulation in immigration proceedings generally, then the regulation itself would warrant closer scrutiny and possibly modification. A discussion of how the courts of appeals have evaluated the Board's scope-of-review regulation will help to explore this question further.

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110. See *In re H-L-H-*, 25 I. & N. Dec. at 212; *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008); see also 8 C.F.R. § 1003.1(d)(3)(i).

111. See *In re H-L-H-*, 25 I. & N. Dec. at 212.

112. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889.

113. See *In re R-S-H-*, 23 I. & N. Dec. 629, 637 (BIA 2003) ("A factfinding may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder." (internal quotation marks omitted)). For examples of cases that have followed *In re R-S-H-* after the Board's decision in *In re A-S-B-*, see *In re Kafilat Adetoro Longe*, File A074-404-848, 2008 WL 4065988, at \*1 (BIA Aug. 8, 2008), and *In re Chable-Cauch*, File A078-185-369, 2008 WL 3919086, at \*1 (BIA July 29, 2008).

### III. FURTHER DIVERGENCE IN THE COURTS OF APPEALS

The case law in the courts of appeals that has evaluated the scope-of-review regulation further supports the case for reform of the regulation. While some of the Board's faulty decisionmaking was clearly of its own making, the problems inherent in the current scope-of-review regulation become more readily apparent when evaluating the decisions in the courts of appeals. These decisions show a large amount of divergence on a multitude of different questions concerning the scope-of-review regulation. The following discussion will highlight and evaluate the three major areas of confusion and disagreement within the opinions rendered by the courts of appeals.

#### A. *Whether the Board Is Limited to the Findings of the Immigration Judge*

Interpreting the scope-of-review regulation, the appellate courts have come to different conclusions about the parameters of the Board's authority to review the record. Several decisions have found that the Board's authority extends to the consideration of record evidence not discussed by the immigration judge nor used as a basis for the immigration judge's ultimate determination. For example, in *Efimova v. Mukasay*, the court held that it was permissible for the Board to vacate the immigration judge's grant of cancellation of removal on the basis of, *inter alia*, portions of the record that were not emphasized by the immigration judge.<sup>114</sup> Other decisions have gone even further, holding that the Board does not engage in impermissible factfinding as long as it bases "its decision on facts already in the record."<sup>115</sup> In *Ye v. Department of Homeland Security (DHS)*, the court found that the Board did not contravene its limited factfinding role when it determined that the applicant was not credible on the basis of an inconsistency that the immigration judge did not cite.<sup>116</sup>

In contrast, in other decisions the courts of appeals have found that the scope-of-review regulation does not permit the Board to base its determination on any facts in the record not reviewed or explicitly considered by the immigration judge in rendering his or her decision. In *Zheng v. DHS*, for example, the Board found the asylum applicant not credible on the basis of inconsistencies that "were not relied on or mentioned by" the immigration judge.<sup>117</sup> The court concluded that the

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114. *Efimova v. Mukasey*, 292 F. App'x 118, 120 (2d Cir. 2008).

115. *Ye v. DHS*, 446 F.3d 289, 296 (2d Cir. 2006); *see also* *Pan v. Mukasey*, 266 F. App'x 21, 22-23 (2d Cir. 2008).

116. *Ye*, 446 F.3d at 296.

117. *Zheng v. DHS*, 332 F. App'x 696, 699 (2d Cir. 2009).

Board's actions "constituted improper fact-finding" under its limited scope of review.<sup>118</sup> Similarly, in the cancellation-of-removal case *Padmore v. Holder*, the court chastised the Board for rendering findings regarding the nature of the applicant's criminal convictions when the immigration judge "made no such findings with respect to them."<sup>119</sup> The court found it inconsequential that the Board's findings were based on its assessment of conviction documents that were part of the administrative record.<sup>120</sup>

The divergence in what courts think the Board can consider provides the Board with inconsistent guidance on how to define the scope of its authority to review an administrative record. What these cases show is that, in large part, it often comes down to the type of inquiry the Board is making, the form of relief or protection from deportation at issue, and the case's procedural posture. Courts afford greater latitude to Board decisions that affirm the immigration judge's determination, but merely supplement the immigration judge's findings.<sup>121</sup> Intuitively, greater latitude in such a scenario makes sense. However, if the parameters of the Board's scope of review are to be understood in a consistent manner, then it would appear necessary for courts to apply that standard uniformly, regardless of the merits of the decision as it pertains to the underlying form of relief.

*B. Whether the Board May Reweigh Evidence of Record for Determinations that Are Not Discretionary*

Because the Board thinks that it has de novo authority to reweigh evidence of record, it is important to consider whether the courts of appeals agree with its interpretation. The cases establish that, by and large, the appellate courts do not *expressly* agree with the Board on this point.<sup>122</sup>

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118. *Id.*; *cf.* *Shao v. Mukasey*, 546 F.3d 138, 162 (2d Cir. 2008) (noting that the Board accepted the immigration judge's "critical finding of fact" and that the petitioner could not establish error on the basis of the Board reviewing evidence because the parties consented to its review).

119. *Padmore v. Holder*, 609 F.3d 62, 68 (2d Cir. 2010).

120. *Id.* at 68–69. Similarly, the Ninth Circuit held in *Brezilien v. Holder* that the Board erred by rendering factual findings not made by the immigration judge regarding the applicant's asylum claim. 569 F.3d 403, 413–14 (9th Cir. 2009). The court essentially ignored the Board's holdings in *In re A-S-B-* and *In re V-K-* and found that deference was not warranted because of the regulation's "clear . . . text." *Id.*

121. *See, e.g.*, *Krishnapillai v. Holder*, 563 F.3d 606, 615 (7th Cir. 2009) ("We review the IJ's decision as supplemented by the Board's own analysis."); *Ye*, 446 F.3d at 293, 296; *Chen v. Gonzales*, 417 F.3d 268, 271 (2d Cir. 2005) ("Where the [Board of Immigration Appeals (BIA)] adopts the decision of the IJ and merely supplements the IJ's decision, however, we review the decision of the IJ as supplemented by the BIA.>").

122. *See, e.g.*, *Sherpa v. Holder*, 374 F. App'x 104, 105 (2d Cir. 2010) ("The BIA may not reject a factual finding simply because it would have weighed the evidence differently or

Court decisions that strike down the Board's authority to reweigh evidence fall generally into one of three categories.

The first reason courts find that the Board may not reweigh evidence of record is simply the express language of the Attorney General's commentary accompanying the scope-of-review regulation,<sup>123</sup> which, as noted above, prohibits reweighing evidence.<sup>124</sup> There can be no question that this reason is justified; the Attorney General's interpretation of its own regulations is binding on the Board.<sup>125</sup> And, as explained before, the pronouncement by the Attorney General that the Board may reweigh evidence de novo was only in relation to *discretionary* determinations and the Board's assessment of the equities in a given case.<sup>126</sup>

The second way courts have struck down the Board's authority to reweigh evidence is by analogizing to instances outside the immigration context where courts apply the clearly erroneous standard.<sup>127</sup> This reason is also justified because, even assuming *arguendo* that the Attorney General had the authority to interpret the clearly erroneous standard in a manner contrary to the way it is ordinarily applied, no effort was made to do so. To the contrary, the supplemental information to the regulation draws support for its interpretation of clearly erroneous review from the Supreme Court's decision in *Anderson v. Bessemer City*,<sup>128</sup> a case that reviewed how the federal

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decided the facts differently had it been the factfinder."); *Hernandez Ramirez v. Holder*, 372 F. App'x 502, 503 (5th Cir. 2010) (upholding the Board's decision because it "did not reweigh the facts"); *De La Rosa v. Holder*, 598 F.3d 103, 108 (2d Cir. 2010) ("The standard of review entailed by 'weight of the evidence' cannot be squared with review for clear error in this Circuit."); *Alvarado de Rodriguez v. Holder*, 585 F.3d 227, 234–35 (5th Cir. 2009) (finding that the Board must have reweighed the evidence to reach a conclusion contrary to the immigration judge); *Kabba v. Mukasey*, 530 F.3d 1239, 1245–46 (10th Cir. 2008) (faulting the Board for failing to defer to the immigration judge's determination that the asylum applicant did not know that the documents he submitted were fraudulent); *Wang v. Gonzales*, 190 F. App'x 49, 50–51 (2d Cir. 2006) (holding that the Board erred by substituting its own opinion about whether the Chinese government would count the applicant's United States-born children for purposes of enforcing its population control policies).

123. See, e.g., *Alvarado de Rodriguez*, 585 F.3d at 234; *Kabba*, 530 F.3d at 1245.

124. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,889 (Aug. 26, 2002).

125. See 8 U.S.C. § 1103(a)(1) (2006); see also *In re A-A-*, 20 I. & N. Dec. 492, 502 & n.23 (BIA 1992).

126. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

127. See, e.g., *De La Rosa*, 598 F.3d at 108 (citing *Ceraso v. Motiva Enters.*, 326 F.3d 303, 316–17 (2d Cir. 2003)).

128. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)).

courts of appeals should apply the clearly erroneous standard to a federal district court's *de novo* assessment of the record. In *Anderson*, the Court stated that “the court of appeals may not reverse [the decision before it] even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”<sup>129</sup> The Supreme Court's language is nearly identical to that used by the Attorney General, and further undermines the Board's conclusion that it has authority to reweigh evidence of record under its scope of review.

The third method courts use is simply to determine that the Board could not have reached the decision it did unless it had reweighed the evidence in contravention of its standard of review for factual findings.<sup>130</sup> Although this reasoning is more precarious and subject to abuse, there is no reason why it would not be legitimate if the record establishes that the Board improperly weighed the evidence. Specifically, the record must show that the Board voiced disagreement with how the immigration judge characterized the evidence, and it does so in a situation where the immigration judge's interpretation of the evidence was reasonable. The Board's disagreement with the immigration judge would demonstrate that there were multiple ways to interpret the facts at hand. The reasonableness of the immigration judge's interpretation would mean that the Board could not overturn it under the clearly erroneous standard of review.<sup>131</sup>

Although there do not appear to be any appellate court cases that *explicitly* condone the Board reweighing evidence, there is *implicit* acceptance in certain instances. This implicit acceptance is based on how an appellate court defines what in the record the Board can consider in the first place. (This was discussed *supra* Part III.A.) If courts do not think the Board has authority to review *de novo* any aspect of the record not specifically mentioned by the immigration judge, then any meaningful discussion by the Board of the probative value of other evidence could be construed by appellate courts as reweighing the evidence. However, courts that permit the Board to consider evidence that is in the record but not cited by the immigration judge in support of the decision are, in essence, permitting the

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129. *Anderson*, 470 U.S. at 574.

130. See, e.g., *Kaplun v. Attorney Gen.*, 602 F.3d 260, 272 n.9 (3d Cir. 2010) (“[T]he Board applied a *de novo* standard to all of the IJ's relevant factual findings.”); *Wang v. Gonzales*, 190 F. App'x 49, 51 (2d Cir. 2006) (“[T]he BIA appears to have simply substituted its own judgment for that of the IJ.”).

131. See *Anderson*, 470 U.S. at 573–74 (stating that appellate courts applying the clearly erroneous standard of review cannot overturn plausible findings of fact); see also *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 138 (3d Cir. 2009) (crediting a trial judge's reasonable inference derived from the facts of the case); *United States v. Stevenson*, 396 F.3d 538, 542 (4th Cir. 2005) (applying the *Anderson* plausibility standard).

Board to reweigh evidence, even though they do not characterize it as such.

A hypothetical will help to illustrate this point. Assume that an administrative record is limited to facts A, B, and C, and the immigration judge issues a decision on the basis of facts A and B. Under the court interpretation allowing the Board to consider any evidence of record, the Board would be permitted to consider fact C in its assessment. If, in its review of the record, the Board does consider fact C and uses it to render its ultimate determination, then the Board has necessarily assigned fact C greater weight than the immigration judge did. This is so because the immigration judge implicitly assigned zero weight to fact C by failing to consider it.

Decisions in the courts of appeals confirm the view that the Board has no *express* authority to reweigh evidence of record under the scope-of-review regulations. This is apparent from the wording of the regulation, the Attorney General's binding interpretation of the regulation, and the general principles of appellate review applicable to the clearly erroneous standard of review. However, if some court decisions implicitly condone the Board reweighing evidence, then these decisions reinforce a mode of analysis encompassing a framework of review comparable to the one the Board would employ if it were to expressly consider *de novo* the weight to afford various parts of the record. Given that the Board has decided tens of thousands of nuanced, fact-intensive cases since the Attorney General implemented the scope-of-review regulation in 2002,<sup>132</sup> it becomes apparent why the current framework has been problematic, even for issues like reweighing evidence that, on the surface, appear straightforward.<sup>133</sup>

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132. See STATISTICAL YEAR BOOK, *supra* note 10, at S2 fig.27 (charting the number of cases that have come before the Board in recent years).

133. Even if the Board did not make the erroneous conclusion that it could reweigh findings of fact, there might still be ambiguity associated with its authority to determine *de novo* whether undisputed facts are sufficient to meet a legal standard. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890 ("The 'clearly erroneous' standard does not apply to determinations of matters of law, nor to the application of legal standards..."). This is because the Board's determination of whether an applicant satisfied an ultimate legal standard would still require it to assess the undisputed facts before it, and a determination contrary to the immigration judge could still create the *appearance* that the Board has engaged in improper weighing of the evidence. Thus, even though the Board's analysis would be operating well within the parameters of its *de novo* authority, a reviewing court could carelessly conclude that the Board has engaged in improper *de novo* factfinding. Cf. Ramadan v. Gonzales, 479 F.3d 646, 648 (9th Cir. 2007). This problem is exacerbated by the fact that federal appellate courts have long viewed the inquiry into certain forms of relief and protection as entirely questions of fact. See, e.g., Sowe v. Mukasey, 538 F.3d 1281, 1285 (9th Cir. 2008); Butt v. Keisler, 506 F.3d 86, 89 (1st Cir. 2007); Perlera-Escobar v. EOIR, 894 F.2d 1292, 1296 (11th Cir. 1990); Ipinia v. INS, 868 F.2d 511, 513 (1st Cir. 1989); Arteaga v. INS, 836 F.2d

C. *Whether the Probability of a Future Event Is a Factual Question Distinct from the Ultimate Determination of a Legal Standard*

There is little dispute that under the scope-of-review regulation, the Board may consider de novo whether a set of undisputed facts is sufficient to meet a legal standard.<sup>134</sup> Thus, for example, if an immigration judge finds that police beat an asylum applicant on three occasions, the Board may consider de novo whether these beatings satisfy the ultimate legal standard for past persecution. However, an interesting issue has emerged in the courts of appeals concerning the scope of the Board's authority to review de novo whether an applicant has satisfied an ultimate legal standard that concerns future events. The issue stems from the predictive component of these legal standards. In CAT claims, for example, an applicant must prove that it is more likely than not that the applicant would be tortured if returned to his or her home country.<sup>135</sup> For asylum claims, it is less clear what precise likelihood of future harm an applicant must establish, but certainly the requisite probability is less than a preponderance, and might even drop to as low as ten percent.<sup>136</sup> The germane inquiry concerns how, exactly, appellate courts factor this predictive component into the Board's assessment of whether an applicant has satisfied an ultimate legal standard. In other words, do appellate courts consider the predictive component a distinct *factual* finding that the Board cannot review de novo? Needless to say, the courts have reached different conclusions.

One of the primary appellate court cases to address this issue is *Kaplun v. Attorney General*.<sup>137</sup> The *Kaplun* decision was the first time that an appellate court rendered judgment over one of the Board's precedential scope-of-review cases. The petitioner, Vadim Kaplun, is the CAT applicant in the Board case *In re V-K*- discussed above. To refresh, in *In re V-K*-, the Board overturned the immigration judge's determination that the applicant established he more likely than not would be tortured if returned to

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1227, 1228 (9th Cir. 1988); *Cruz-Lopez v. INS*, 802 F.2d 1518, 1519 n.1 (4th Cir. 1986); *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1539 (9th Cir. 1985); *Carvajal-Munoz v. INS*, 743 F.2d 562, 567-68 (7th Cir. 1984).

134. See Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890; see also *Chen v. Mukasey*, 293 F. App'x 800, 802 (2d Cir. 2008) ("[R]equiring the BIA to apply a legal standard to a set of uncontested facts [is] permissible under the regulations.").

135. See 8 C.F.R. § 1208.16(c)(2) (2010).

136. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987); *Karaj v. Gonzales*, 462 F.3d 113, 116-17 (2d Cir. 2006); *Susanto v. Gonzales*, 439 F.3d 57, 60 (1st Cir. 2006); *Lukwago v. Ashcroft*, 329 F.3d 157, 177 (3d Cir. 2003).

137. *Kaplun v. Attorney Gen.*, 602 F.3d 260 (3d Cir. 2010).

Ukraine.<sup>138</sup>

In *Kaplun*, the Third Circuit determined that the probability that the applicant would be tortured is a question of fact.<sup>139</sup> As such, the Board could only reverse the immigration judge if his findings related to the future probability of torture were clearly erroneous.<sup>140</sup> The court distinguished the likelihood of future harm from the separate “legal question” of whether the harm would constitute torture.<sup>141</sup> Because “[t]orture is a term of art” and the likelihood of harm is a factual determination, the court held that the Board must “break down the inquiry into its parts and apply the correct standard of review to the respective components.”<sup>142</sup>

On its face, the Third Circuit’s logic appears well-grounded because the predictive valuation of future harm can intuitively be seen as a factual inquiry. However, the rationale is contrary to the framework announced by the Board, and the Board’s interpretation of its own regulation is entitled to deference.<sup>143</sup> Recall that in *In re V-K-*, the Board acknowledged that future predictions involve questions of fact, just not the type of facts that fall under the rubric of factfinding when it applies its scope of review under the regulation.<sup>144</sup> In this sense, the Board’s understanding of its scope of review can be seen as an interpretation of the Attorney General’s supplemental information, which stated that the Board has *de novo* authority to review “judgments as to whether the facts established by a particular alien amount to . . . a ‘well-founded fear of future persecution.’”<sup>145</sup> Interestingly, the Third Circuit did consider this possible interpretation of the term judgments in the regulation but rejected it, instead concluding that the

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138. *In re V-K-*, 24 I. & N. Dec. 500, 502 (BIA 2008).

139. *Kaplun*, 602 F.3d at 269.

140. *Id.* at 272 & n.9.

141. *Id.* at 271.

142. *Id.*

143. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). Not surprisingly, the court discounted any deference that would ordinarily be owed to the Board by finding that the Board “plainly err[ed]” by premising its decision on its belief that an “assessment of the probability of future torture is not a finding of fact because the events have not yet occurred . . .” *Kaplun*, 602 F.3d at 269; see *Auer*, 519 U.S. at 461 (stating that deference is not owed to agency interpretations that are “plainly erroneous or inconsistent” with the regulation (internal quotation marks omitted)). However, this is not exactly what the Board stated in *In re V-K-*. Rather, the court’s rendition of the Board’s analysis is closer to what the Board stated in *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008), and *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010), decisions that were not before the court. See *Kaplun*, 602 F.3d at 269 n.7.

144. *In re V-K-*, 24 I. & N. Dec. 500, 501 (BIA 2008).

145. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,890 (Aug. 26, 2002).



review of judgments de novo discussed by the Attorney General only referred to judgments regarding “legal standards or the exercise of discretion.”<sup>146</sup> In this respect, the Third Circuit’s reasoning is circular—or at least self-fulfilling—because it is entirely based on its previous determination that the predictive component of the inquiry concerns a separate question of fact. If the Third Circuit had determined that the ultimate legal standard did encompass a future prediction, it would follow that such predictions would be included within the scope of “legal standards” that it concedes the Board has authority to review de novo.

The Third Circuit’s analysis is also at odds with other decisions in the courts of appeals that have found no need to distinguish between the purportedly “legal” and predictive components of an ultimate statutory or regulatory standard. In *Lin v. Holder*, for example, the Second Circuit upheld the Board’s determination that the applicant failed to establish a well-founded fear of persecution because the applicant’s “fear of undergoing a mandatory gynecological examination was too speculative to merit relief.”<sup>147</sup> The court determined that the scope-of-review regulation authorized the Board “to review de novo the [immigration judge’s] legal determination regarding [the applicant’s] eligibility for relief,” and that the applicant failed to “establish an objectively reasonable fear” of persecution.<sup>148</sup> Thus, the Second Circuit assumed that the probability of future harm was encompassed within the parameters of the Board’s assessment of whether an applicant satisfied a legal standard.<sup>149</sup>

The distinction in the modes of analysis used by appellate courts to assess the predictive component may also stem from the type of relief or protection at issue, and the specific facts of any one case. As to the type of relief or protection, *Lin* concerned the question of whether the applicant established a well-founded fear of persecution.<sup>150</sup> In assessing such claims, the analysis is often phrased as whether the applicant established an objectively reasonable fear of persecution.<sup>151</sup> This phraseology washes over

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146. *Kaplan*, 602 F.3d at 268 n.6.

147. *Lin v. Holder*, 365 F. App’x 311, 312 (2d Cir. 2010).

148. *Id.* at 312–13.

149. *See id.*; *see also* *Duka v. Holder*, 345 F. App’x 720, 721 (2d Cir. 2009) (labeling the well-founded fear standard as a “legal determination” and defining it as “a *reasonable possibility* of persecution” (emphasis added)).

150. *Lin*, 365 F. App’x at 311–12.

151. *See, e.g.*, *Woldemichael v. Ashcroft*, 448 F.3d 1000, 1004 (8th Cir. 2006); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003); *Alvarez-Flores v. INS*, 909 F.2d 1, 5 (1st Cir. 1990). In addition to demonstrating an objectively reasonable fear of persecution, an applicant must also establish a “subjective” fear of persecution, which means that the applicant “genuinely fears persecution.” *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1289 (11th Cir. 2001). The relevance of the subjective component in an assessment of an applicant’s

the predictive aspect and, in part, drives the manner by which a reviewing court assesses the issue before it. *Kaplun*, by contrast, concerned a CAT claim where the requisite likelihood of torture is expressly codified by regulation.<sup>152</sup> This explicit codification has caused reviewing courts to incorporate the predictive language into the manner by which they speak about CAT claims, and hence assess these claims.<sup>153</sup>

As to the specific facts of any one case, a slight factual distinction between *Kaplun* and *Lin* highlights how the facts of any one case may influence a reviewing court's interpretation of the Board's scope-of-review regulation. In *Kaplun*, an expert testifying on Kaplun's behalf stated that Kaplun would likely be detained and imprisoned in horrid conditions if deported,<sup>154</sup> whereas the applicant in *Lin* did not have any experts testify on her behalf, nor did she submit evidence that authorities in China would force her to undergo a gynecological examination.<sup>155</sup> In both cases, the Board labeled the applicant's fear of harm as "speculative,"<sup>156</sup> but in *Lin*, the court found that it was reasonable for the Board to view the prospect of future harm as speculative.<sup>157</sup> Would the *Lin* court have found the Board's decision equally reasonable if an expert had testified at trial that authorities would likely subject Lin to a gynecological examination if she were deported to China? Perhaps not. At the very least, the added component of expert testimony would likely make the court think twice about whether the predictive component of the well-founded fear test could—or should—be separated from the more obviously legal one.

Neither of the courts' interpretations of the regulation is entirely satisfactory. Both contain merits and drawbacks. Separating the predictive component is intuitively understandable but likely unworkable in the myriad of different factual scenarios that have the potential to muddle the two components together. Leaving them together will allow for a more uniform application, but will lead to circumstances in which the Board oversteps its authority, irrespective of how it interprets its de novo authority to review judgments. Thus, under the current regulation, the different ways to interpret future events will simply lead to greater uncertainty and

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asylum claim is usually limited to instances where the applicant's credibility is at issue.

152. *Kaplun v. Attorney Gen.*, 602 F.3d 260, 263 (3d Cir. 2010); 8 C.F.R. § 1208.16(c)(2) (2010).

153. *See, e.g.*, *Chen v. Gonzales*, 470 F.3d 1131, 1139 (5th Cir. 2006); *Lin v. U.S. Dep't of Justice*, 432 F.3d 156, 157 (2d Cir. 2005); *Auguste v. Ridge*, 395 F.3d 123, 138–39 (3d Cir. 2005).

154. *Kaplun*, 602 F.3d at 272.

155. *Lin*, 365 F. App'x at 312–13.

156. *Kaplun*, 602 F.3d at 272; *Lin*, 365 F. App'x at 312.

157. *Lin*, 365 F. App'x at 312–13.

divergent standards and further support the case for revisiting the regulation.

#### IV. A CASE FOR REGULATORY REFORM

A review of the Attorney General's commentary and cases adjudicated by the Board and courts of appeals shows that the scope-of-review regulation is in disarray. The Attorney General provided an interpretation of the regulation that opened the door to divergent applications of the enunciated standards.<sup>158</sup> Subsequently, the Board issued several precedential decisions that contained multiple interpretations of its scope-of-review authority, creating contradictions between its own opinions,<sup>159</sup> and between its opinions and the Attorney General's commentary.<sup>160</sup> Reviewing the Board's decisions, the courts of appeals reached different conclusions on several principal aspects of the Board's scope-of-review authority.<sup>161</sup> Given all of these shortcomings, it is apparent that the scope-of-review regulation is simply not working.

The scope-of-review regulation also fails to fulfill the Attorney General's two justifications for altering the Board's scope of review in the first place. First, the Attorney General suggested that "immigration judges may be better positioned than the Board to decide factual issues."<sup>162</sup> However, this justification erroneously presupposes that the agency would consistently decipher when an issue is "factual" in the sense that deference would be warranted. Additionally, it merely states that which was already known; the Board assumed long before the scope-of-review regulation that an immigration judge, as the adjudicator privy to the firsthand account of the evidence, is better suited than the Board to evaluate certain aspects of the record.<sup>163</sup>

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158. See *supra* Part I; Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,888–89 (Aug. 26, 2002).

159. See *supra* Part II. Compare *In re A-S-B-*, 24 I. & N. Dec. 493, 498 (BIA 2008) (an assessment of future events can never involve factfinding), and *In re H-L-H-*, 25 I. & N. Dec. 209, 212 (BIA 2010), with *In re V-K-*, 24 I. & N. Dec. 500, 501 (BIA 2008) (future predictions do not involve factfinding under the regulation).

160. See *supra* Part II. Compare Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (stating that the Board may not reweigh evidence), with *In re H-L-H-*, 25 I. & N. Dec. at 212 (stating that the Board has de novo authority to reweigh evidence).

161. See *supra* Part III.

162. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889.

163. See *In re A-S-*, 21 I. & N. Dec. 1106, 1109 (BIA 1998) ("[I]t is . . . well established that because the Immigration Judge has the advantage of observing the alien as the alien testifies, the Board accords deference to the Immigration Judge's findings concerning

Second, the Attorney General justified the need to limit the Board's scope of review by noting that a duplication of the immigration judge's efforts by the Board can lead to "a huge cost in diversion of judicial [and agency] recourses."<sup>164</sup> While the need to conserve resources is a legitimate justification, in this case, the Board's efforts are largely duplicitous anyway because it defines its *de novo* authority so broadly. Moreover, since the Board deferred to the immigration judge on select findings of fact even before the enactment of the scope-of-review regulation, the regulation did not cause additional duplicitous efforts in those circumstances.<sup>165</sup>

A substantial divergence in recourses has occurred in the federal appellate courts, since they are tasked with assessing whether the Board's decisions comport to the parameters of its scope-of-review authority every time a petitioner raises the issue on appeal. While petitioners already allege on a regular basis that the Board acted outside its scope of review,<sup>166</sup> the

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credibility and credibility-related issues."); *In re Burbano*, 20 I. & N. Dec. 872, 874 (BIA 1994) (stating that the Board would afford deference to an immigration judge for matters other than credibility determinations "that are based upon his or her observance of witnesses when the basis for those findings are articulated in the immigration judge's decision").

164. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574–75 (1985)).

165. *See id.* In addition to the fact that the Attorney General's justifications have not materialized since it issued the scope-of-review regulation, it should also be pointed out that in justifying the regulation, the Attorney General drew support for greater deference from the rationale provided by the Supreme Court in a case that explained why federal appellate courts should defer to the findings of a district court judge. *Id.* Unlike the federal circuit courts, the Board is a specialty appellate body, which might provide an additional reason why deference to immigration judges need not be applied so rigidly. However, a significant number of judges and commentators have expressed frustration with the quality of Board opinions, which calls into question the extent to which the Board should be given *de novo* authority to review the decisions of immigration judges. *See, e.g.,* *Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (remarking on the perceived "egregious failures of the . . . Board"); Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 11–36 (2006). Although the Board's decisions are not regularly models of clarity, the decisions of immigration judges are comparably problematic. Many of the problems stem from the fact that immigration judges typically issue their decisions orally at the conclusion of the hearings, which does not necessarily provide them with sufficient time to consider fully all the evidence of record. Nor do immigration judges have resources sufficient to conduct research to the extent warranted in any given case. Consequently, while the criticisms of the Board's opinions are understandable, these criticisms do not provide a basis for maintaining the codified heightened deference in light of the current deficiencies in the regulatory framework explored in this Article.

166. In addition to the cases cited *supra* Part III, see, e.g., *Ramirez-Peyro v. Gonzales*, 477 F.3d 637, 640–41 (8th Cir. 2007), *Liang v. Holder*, 377 F. App'x 115, 116–17 (2d Cir. 2010), *Perez-Gill v. Attorney General*, 343 F. App'x 824, 825–26 (3d Cir. 2009), and *Figueroa-Matos v. Attorney General*, 312 F. App'x 480, 481–82 (3d Cir. 2009).

frequency of these challenges will only increase as additional—real or perceived—deficiencies in the Board's interpretation and application of the regulatory standards continue to materialize in appellate court decisions. In addition to draining the resources of the federal appellate courts, the scope-of-review regulation also diverts the resources of the Attorney General, since the Justice Department is responsible for defending the decisions of the Board in the thousands of immigration cases filed in the appellate courts every year.<sup>167</sup>

Given the myriad of problems with the scope-of-review regulation, this Article recommends that the Attorney General amend the current regulation to eliminate the requirement that the Board review the findings of fact rendered by an immigration judge under the clearly erroneous standard of review. Instead, the Attorney General should again permit the Board to consider factual determinations *de novo*. Providing the Board with such *de novo* authority will turn the attention of the proceedings back to the substantive issues of a case. As it did before the 2002 regulations, the Board should still provide a certain level of deference to the findings of fact rendered by an immigration judge, particularly when such factfinding is based on the characteristics of a trial that can make direct observation particularly important, such as credibility determinations.<sup>168</sup> Providing such deference as a matter of agency practice instead of obligation will help to avoid the procedural nuances inherent in the interpretation of the scope-of-review regulation that have become the center of so much litigation.

If the Attorney General determines that the scope-of-review regulation should retain the clearly erroneous standard of review for factual findings, additional clarifications should still be made to provide the Board with more precise guidance so that it may better assess when it must defer to the findings of the immigration judge. Indeed, even if the Attorney General were to provide the Board with *de novo* authority to review questions of fact, it would still be helpful to have clarification about the parameters of factfinding to enhance the consistency of opinions, since the Board would still defer to an immigration judge in certain instances as a matter of agency practice. However, any reform action seeking to define the parameters of factfinding must be careful to avoid defining too concretely the types of issues that the Board should construe as factfinding. For as this analysis has shown, it is nearly impossible to classify a category of circumstances as wholly factual or legal without suffering from over-inclusiveness or under-inclusiveness.

Despite the need to tread carefully, the Attorney General should provide

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167. See U.S. DEP'T OF JUSTICE, *supra* note 33.

168. See *In re A-S*, 21 I. & N. Dec. at 1109; *In re Burbano*, 20 I. & N. Dec. at 874.

additional guidance on some of the main problems identified in this Article. First, the Attorney General should clarify that inferences about future events can constitute factfinding. Similarly, there should be additional clarification about whether the predictive component of forward-looking forms of relief and protection are distinct from the legal question of whether an applicant has satisfied an ultimate statutory or regulatory standard. Further clarification on this point does not necessarily require the Attorney General to render a definitive determination one way or the other. Indeed, recognition of ambiguity can itself be helpful in the evaluation of a nuanced issue.

The Attorney General should also revisit the issue of whether and when the Board can reweigh evidence of record. Although the supplemental information accompanying the scope-of-review regulation states expressly that reweighing evidence is not permissible,<sup>169</sup> this pronouncement should be revisited to determine whether the nature of immigration cases require a more refined approach,<sup>170</sup> given that the courts of appeals sometimes provide the Board with implicit authority to reweigh evidence of record de novo.<sup>171</sup> Finally, the Attorney General should clarify the term *judgments*. The use of this term in multiple contexts in the supplemental information accompanying the regulation only serves to obfuscate its meaning,<sup>172</sup> as seen in the different ways the Board has applied the term in its precedential decisions.<sup>173</sup>

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169. Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,889.

170. On the issue of reweighing evidence, the comments in the supplemental information accompanying the regulation are based on the relationship between an appellate court and a district court. *See id.*

171. *See supra* Part III.B.

172. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. at 54,890.

173. Compare *In re V-K-*, 24 I. & N. Dec. 500, 501–02 (BIA 2008) (using the Board's authority to review judgments de novo as a basis for its decision), with *In re A-S-B-*, 24 I. & N. Dec. 493, 497–98 (BIA 2008) (omitting any reference to judgments in its assessment of the record), and *supra* Part III.A (discussing the omission of judgments from the *In re A-S-B-* analysis). In clarifying these points of the scope-of-review regulation, the Attorney General has two options. First, he can do it in the supplemental information to an amended rule. *See* 8 U.S.C. § 1103(a)(1) (2006) (“[D]etermination and ruling by the Attorney General with respect to all questions of law shall be controlling.”). Second, he can certify a Board opinion to himself and decide the issue. *See* 8 C.F.R. § 1003.1(h)(1)(i) (2010) (“The Board shall refer to the Attorney General for review of its decision all cases that [t]he Attorney General directs the Board to refer to him.”).

### CONCLUSION

The Board's role in assessing immigration claims is not an easy one. Rendering judgment about events that have happened—or that may happen—halfway around the world is a challenging task. But the interpretation and application of the regulation currently guiding the Board's scope of review has only made reviewing immigration claims more precarious, without significant offsetting benefits. Amending the scope-of-review regulation to let the Board review factual determinations *de novo* will allow the Board to focus on the substantive issues of each case and permit courts of appeals to do the same. Without changes or significant clarification to the regulation, the drain on agency and judicial resources will only increase, and the ambiguities surrounding the proper application of the regulation will continue multiplying.