**No. 22-1122**

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

**John SMITH,**

**Petitioner,**

**v.**

**Merrick B. GARLAND,**

**Attorney General of the United States,**

**Respondent.**

**PETITION FOR REVIEW**

**FROM THE UNITED STATES DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**BOARD OF IMMIGRATION APPEALS**

**AGENCY CASE NUMBER: A012-345-678**

**PETITIONER’S REPLY BRIEF**

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Respondent spends several pages of its re-statement of the case reciting Mr. Smith’s “lengthy criminal history.” (Res. Br. at 6-9.) This is entirely irrelevant to the question on appeal before this Court. Indeed, its presence in Respondent’s brief appears to be for the sole purpose of attempting to bias this Court against Mr. Smith and to sway this Court away from a fair review of the BIA’s decision. Bias has no place in the law. This Court should reject Respondent’s attack on Mr. Smith’s character and fairly consider this appeal. When it does that, there is no question that the BIA erred in vacating the IJ’s factual determination that Mr. Smith would more likely than not face torture or death at the hands of the government if he returns to England.

In its response, Respondent also wrongly asserts that Mr. Smith attempts to package factual arguments as legal arguments. (*I**d.* at 25-26.) Not so. The BIA did not apply the proper standard of review in practice and conducted its own independent factfinding. That was improper. Nor is it the province of this Court to weigh the facts and decide whether Mr. Smith met his burden; rather, this Court must decide whether the BIA adequately explained why it rejected the IJ’s finding and identified reasons grounded in the record that are sufficient to satisfy a reasonable mind that there was clear error. *See* *A**bdi Omar v. Barr*, 962 F.3d 1061, 1064 (8th Cir. 2020); *see also* *A**nderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). The BIA did not meet this standard. A proper review of the record demonstrates that the BIA legally erred and its decision should be reversed. At a minimum, its decision should be vacated and remanded for the BIA to apply the proper legal standards to its review.

# The BIA failed to review the IJ’s factual findings for clear error.

The BIA erred as a matter of law by failing to apply the “clear error” standard of review and by disregarding most of the IJ’s findings and replacing them with its own. *See* 8 C.F.R. § 1003.1(d)(3)(i). In response, Respondent contends the BIA properly applied the clear error standard because it used the words “clear error” when reviewing the IJ’s factual findings. (*See* Res. Br. at 11, 15-16.) But the question is not whether the BIA *recited* the proper standard—the question is whether it in fact recognized its role as a reviewing court and not a fact-finding court. *See* *W**aldron v. Holder*, 688 F.3d 354, 360-61 (8th Cir. 2012) (“Although the BIA set forth the correct standard of review at the outset of its decision, we agree with Waldron that it deviated from this standard”); *R**odriguez v. Holder*, 683 F.3d 1164, 1170 & n.3 (9th Cir. 2012) (collecting cases) (“We do not rely on the Board’s invocation of the clear error standard; rather, when the issue is raised, our task is to determine whether the BIA faithfully employed the clear error standard or engaged in improper de novo review of the IJ’s factual findings.”). It is irrelevant what the BIA *said.* What matters is what it *did*.

Here, as demonstrated in detail in the opening brief, the BIA erred by engaging in *de novo* alternative factfinding and failing to provide a reasoned basis why the IJ’s findings were clearly erroneous. (Pet. Br. at 18-25.) That was legal error requiring reversal or remand. *See W**aldron*, 688 F.3d at 361 (“[T]here is a difference between weighing the factual findings of the IJ and reweighing the underlying evidence and testimony behind those factual findings to reach new factual conclusions.”); *R**amirez-Peyro v. Gonzales*, 477 F.3d 637, 641 (8th Cir. 2007) (vacating and remanding because the BIA applied the wrong law and “engaged in its own factfinding”). The IJ’s findings of fact “may not be overturned simply because the Board would have weighed the evidence differently or decided the facts differently had it been the factfinder.” *W**aldron*, 688 F.3d at 360 (quotation omitted). And the BIA may not insulate its improper alternative fact-finding from review by simply using the term “clearly erroneous” in its decision. *G**arcia-Mata v. Sessions*, 893 F.3d 1107, 1109 (8th Cir. 2018) (remanding case after BIA overturned IJ’s decision granting withholding of removal because “we cannot discern from the Board’s decision whether it followed the governing regulations on standards of review”).

In his opening brief, Mr. Smith showed that the IJ’s finding that Mr. Smith would more likely than not be tortured was based on the entirety of the record. (Pet. Br. at 18-25 (citing Add. at 4-9, 16-21).) As further shown in Mr. Smith’s opening brief, the BIA failed to engage these factual findings, instead substituting its own findings for those of the IJ. (*I**d.*) Respondent repeats the BIA’s erroneous focus on the *absence* of certain facts. (*E.g.* Res. Br. at 11 (“Smith’s father was not tortured in the past. Neither Smith nor his father are under a current threat of being tortured. Smith’s father has had no contact with England in 25 years. England is an independent country with a different government than when Smith’s father left the country.”).) But the question is not what additional facts *could have* supported the IJ’s finding—the question is whether the facts that the IJ *actually based its decision on* supported its finding. Indeed, Respondent appears to be repeating the exact error made by the BIA by focusing on the *absence* of certain facts rather than the *presence* of others. (*See i**d.* at 16-17.) As this Court has held, when applying the “clear error” standard of review, the BIA “must adequately explain why it rejected the IJ’s finding and identify reasons grounded in the record that are sufficient to satisfy a reasonable mind that there was clear error.” *A**bdi Omar*, 962 F.3d at 1064. The BIA’s decision does not meet this standard.

Clearly, Respondent prefers the BIA’s factual findings over those of the IJ. But that is precisely the reason why Mr. Smith’s Petition should be granted—Respondent, like the BIA, shows “that had it been sitting as the trier of fact, it would have weighed the evidence differently” than the IJ did, but inherently acknowledges that “there are two permissible views of the evidence” by failing to articulate what was clearly erroneous about the IJ’s findings. *A**nderson*, 470 U.S. at 574. The IJ correctly considered the entirety of the record and made a well-supported finding that it was more likely than not that Mr. Smith would be tortured if returned to England. The BIA was limited to reviewing IJ’s decision for clear error. Instead, the BIA incorrectly considered the absence of certain facts and made a contrary finding by engaging in improper alternative factfinding. For the same reasons this Court remanded *W**aldron*, the Court should reverse the BIA’s decision here, or at a minimum remand this case to the BIA so that it may review the case using the proper lens.

# The BIA ignored the record evidence and failed to consider Mr. Smith’s CAT claims in the aggregate.

Respondent does not dispute that CAT claims must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible claims. (Res. Br. at 24.) *See I**n re J-R-G-P-*, 27 I. & N. Dec. 482, 484 (BIA 2018) (claims under CAT “must be considered in terms of the aggregate risk of torture from all sources, and not as separate, divisible . . . claims”); *see also H**abtemicael v. Ashcroft*, 370 F.3d 774, 782-83 (8th Cir. 2004) (remanding where agency did not consider all evidence). In his opening brief, Mr. Smith recited the many facts found by the IJ to support its decision that were entirely ignored by the BIA, such as, for example, the fact that Mr. Smith’s father “has been *vocal* about his political beliefs” and “has *written and spoken* out *many times* about tribal conflicts in England.” (Pet. Br. at 29 (emphasis added); *see also i**d.* at 21-30 (reciting facts the BIA ignored).) The BIA entirely ignored *all* those findings and Respondent makes the same mistake here, again focusing on the *absence* of certain facts. (Res. Br. at 17-24.) Tellingly, Respondent spends more words defending the BIA’s decision than the BIA used to make its decision. Regardless, the same error applies—focusing on the absence of facts is irrelevant—the focus should be on the facts that were found.

In an attempt to avoid this truth, Respondent falls back on the argument that “an agency need not write an ‘exegesis on every contention.’” (Res. Br. at 25 (citing *C**amarillo-Jose v. Holder*, 676 F.3d 1140, 1143 (8th Cir. 2012) (citations omitted)).) But *C**amarillo-Jose* is easily distinguishable. There, the BIA *affirmed* the IJ’s decision ordering removal. 676 F.3d at 1142. The petitioner then filed a motion to reopen his proceeding based on new evidence, which the BIA denied. *I**d.* Applying an abuse of discretion standard of review, this Court affirmed, noting that there was no indication the BIA failed to consider the new evidence at issue. *I**d.* at 1143. There was never a determination by the BIA that the IJ’s decision was not supported by the evidence, as is the case here. *C**amarillo-Jose* is wholly distinct from the present case, in which the BIA *reversed* the IJ’s decision without specifically considering the IJ’s specific and detailed factual findings supporting that decision.

When a reviewing Board reverses an IJ decision as not being supported by the evidence, it should actually address the evidence that the IJ *did* rely upon. *See A**nderson*, 470 U.S. at 573-74; *A**bdi Omar*, 962 F.3d at 1064; *see also* *G**uerra v. Barr*, 974 F.3d 909, 915 (9th Cir. 2020) (vacating and remanding the BIA’s reversal of a grant of deferral of removal under CAT because the BIA failed to explain why the IJ’s findings of fact were “illogical, implausible, or not supported by permissible inferences from the record”); *H**uang v. AG of U.S.*, 620 F.3d 372, 387 (3d Cir. 2010) (“[W]hen the BIA reaches a different conclusion than the IJ, either on the facts or the law, its review must reflect a meaningful consideration of the record as a whole. It is not enough for the BIA to select a few facts and state that, based on them, it disagrees with the IJ’s conclusion.”). The BIA’s failure to do so here was in error.

# The BIA’s reliance on a lack of a specific threat as dispositive is erroneous.

It is unsurprising that, after wrongly focusing on the absence of certain facts rather than correctly considering the facts as found, the BIA treated the lack of a recent, specific threat against Mr. Smith or his father as dispositive. This is error. (*See* Pet. Br. at 31-33.) Respondent attempts to defend the BIA’s reliance of a lack of specific threat as simply one reason among many supporting the BIA’s decision. (Res. Br. at 19-20.) But this justification is contrary to the BIA’s own decision, which was premised on the lack of a recent, specific threat to Mr. Smith. (Add. 28-29 (“[Mr. Smith’s] father . . . did not testify about any recent or specific threats. [Mr. Smith] also did not identify a specific or current threat against either his father or himself.”).) Importantly, Respondent concedes that the case cited by the BIA, *M**alonga v. Mukasey*, does not stand for the proposition that a petitioner must provide evidence of a recent, specific threat in order to secure CAT relief. Instead, that is only one factor to be considered. (Res. Br. at 19-20 (citing *M**alonga v. Mukasey*, 546 F.3d 546, 556 (8th Cir. 2008)).)

While evidence of a recent specific threat against Mr. Smith or his father could have further supported Mr. Smith’s CAT claim, the absence of such specific threat is not dispositive or even particularly relevant in view of the facts of this case. The imposition of a “specific threat” requirement would impermissibly preclude relief for many people, like Mr. Smith, who have been in the United States for years—or those who have never been in their country of citizenship because they were born abroad as refugees—but nevertheless face a significant risk of torture or death if deported. The BIA erred as a matter of law in considering this single factor as dispositive. The BIA’s apparent reliance on that absence to find Mr. Smith was not entitled to relief as a matter of law was legally erroneous and requires a reversal, or at a minimum a remand. *See G**arcia-Mata*, 893 F.3d at 1110.

**CONCLUSION**

After reviewing all of the evidence, hearing from all of the witnesses, and making credibility findings, the IJ engaged in detailed factfinding and determined that Mr. Smith demonstrated that he would, in fact, more likely than not be tortured. The BIA erred as a matter of law by ignoring the IJ’s fact findings and substituting its own fact findings, failing to consider Mr. Smith’s CAT claims in the aggregate, and failing to apply the correct legal standard to Mr. Smith’s CAT claims. This Court should grant Mr. Smith’s petition for review and reverse, or at a minimum vacate and remand, the BIA decision.

Dated: April 30, 2021 Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing PETITIONER’S REPLY BRIEF has been prepared in a proportionally spaced typeface of 14-point or more, and contains 2,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Pursuant to Eighth Cir. R. 28A(h), I certify that the foregoing Petitioner’s Opening Brief has been scanned for viruses and is virus-free.

Dated: April 30, 2021 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2021, I electronically filed the foregoing PETITIONER’S REPLY BRIEF with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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