
By Joseph P. Whalen (Saturday, May 16, 2015)

Whether preparing and presenting a case for submission or adjudicating it, it is sometimes quite a challenge to discern the nature of the issues involved. Is an issue more appropriately described as a question of: (1) law, (2) fact, or (3) a mixture of law and fact? What is the difference? How can you tell which is which? Why does it matter? Who is in the best position to decide? Those are some rather simple questions with some very complex answers. If you cannot handle or do not want a complicated answer then all I can say is: “It’s just not that simple.” For everyone else who decides to stay the course, please get your mind set for some deep-thought analysis.

The following excerpt from a 1985, Supreme Court decision includes within it, case citations back to 1935, but I bet we could go back even further. Therefore, it seems to me that we might never stop discussing these key, fundamental issues and questions. If the proper methodology for distinguishing “what is what” is admittedly elusive for the Supreme Court then the best the rest of us can do is simply to make our arguments and hope that we can be persuasive to others interested in the outcome of the case. With all of my wishy-washy qualifying out of the way, I can take my best shot and put forth my best arguments, but first, here is the promised excerpt, it is the majority of three paragraphs.

“…. [T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); Baumgartner v. United States, 322 U.S. 665, 671 (1944). A few principles, however, are by now well established. For example, that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact. See, e. g., Maggio v. Fulford, supra. Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question. See Dayton Board of Education v. Brinkman, 443 U.S. 526, 534 (1979) (finding of intent to discriminate subject to "clearly erroneous" standard of review). But beyond these elemental propositions, negative in form, the Court has yet to arrive at "a rule or principle that will unerringly distinguish a factual finding from a legal conclusion." Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).
Perhaps much of the difficulty in this area stems from the practical truth that the decision to label an issue a "question of law," a "question of fact," or a "mixed question of law and fact" is sometimes as much a matter of allocation as it is of analysis. See Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 237 (1985). At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question. Where, for example, as with proof of actual malice in First Amendment libel cases, the relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S., at 503. Similarly, on rare occasions in years past the Court has justified independent federal or appellate review as a means of compensating for "perceived shortcomings of the trier of fact by way of bias or some other factor. . . ." Id., at 518 (REHNQUIST, J., dissenting). See, e. g., Haynes v. Washington, 373 U.S., at 516 ; Watts v. Indiana, 338 U.S. 49, 52 (1949) (opinion of Frankfurter, J.). Cf. Norris v. Alabama, 294 U.S. 587 (1935).

In contrast, other considerations often suggest the appropriateness of resolving close questions concerning the status of an issue as one of "law" or "fact" in favor of extending deference to the trial court. When, for example, the issue involves the credibility of witnesses and therefore turns largely on an evaluation of demeanor, there are compelling and familiar justifications for leaving the process of applying law to fact to the trial court and according its determinations presumptive weight. Patton v. Yount, supra, and Wainwright v. Witt, supra, are illustrative. There the Court stressed that the state trial judge is in a position to assess juror bias that is far superior to that of federal judges reviewing an application for a writ of habeas corpus. ....”


USCIS is rarely in a position of a trial court because the vast number of adjudication involve petitions and applications that do not require face-to-face interviews or hearings. Those faceless, paper-based adjudications are performed primarily at Service Centers, the National Benefits Center (NBC), the Administrative Appeals Office (AAO), and more recently the Immigrant Investor Program Office (IPO). However, the local field offices and asylum offices primarily perform intensive personal interviews through an inquisitorial adjudicative approach. This smaller class of more intense and complex cases do involve the interpretation of body language, verbal inflection and tone, eye contact, and a host of non-verbal cues, in short, demeanor.
It is USCIS’ interviewing officers that somewhat resemble trial court judges mentioned in the excerpt above. These officers, however, are more like the Magistrates in our District Courts; or a better example is the Inquisiting Magistrates of the English common-law systems that still serve the needs in many countries around the globe. EOIR’s Immigration Judges (IJs) are the adjudicators who are most like trial court judges. IJs preside over Removal Proceedings which begin as adversarial events with each side, the alien respondent and the government, seeking to be declared right and the other side being found wrong.

Once alien respondents either admit removability or are found removable, they most often apply for some form of relief. A request for Relief from Removal (or at least voluntary departure) is nearly identical to any other Benefit Request, primarily it requires shifting from an adversarial to an inquisitorial inquiry. Inquisitorial inquiries are focused on seeking and hopefully finding the truth of the matter (or coming as close as possible); rather than victory over an opponent, or adversary. The level of certainty of “truth” is somewhat subjective because the standard of proof employed is basically a judgment call by a rational and reasonable adjudicator. That standard of proof is explained in the following excerpt.

“The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010) (citing Matter of E-M-, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. Id. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true. ...”

APR302015_01B4203.pdf at p. 3

In preparing a case to meet the preponderance standard, one needs to be clear about what they are trying to prove. Is your specific task to present evidence pertaining to a "question of law," a "question of fact," or a "mixed question of law and fact"? The answer to the preceding question controls evidence selection for the instant case. It may
be helpful to keep in mind one’s obligations as to their burden of proof measured against the applicable standard of proof.

In order to demonstrate the truth of the matter by a preponderance of discernible findings-of-fact and commensurate conclusions-of-law, one must understand their burdens. First, the applicant or petitioner must come forward with evidence in order to meet their burden of production. The purpose of that evidence is to lead the adjudicator to find the facts necessary to demonstrate eligibility as defined by law. That “purpose” is described in jurisprudence as meeting the burden of persuasion. In short, the probative, corroborative, reliable, and credible evidence produced; along with any brief and/or argument offered; must persuade the adjudicator to find in your favor. Is there an initial, minimum, legally-prescribed or suggested piece of evidence required or highly recommended? Examples would include: a labor certification, a birth or marriage certificate, a professional license, DNA test results, or an academic degree. Such concrete items are not difficult to understand. The determination of whether that evidence, mixed with less tangible qualities and characteristics; or uncertain pieces of evidence; meets the burden of persuasion is less straight-forward. For example, if one is seeking a waiver that has as a prerequisite, a qualifying relative, then documentary evidence of the relationship meet the initial minimal burden of production and meets a condition precedent. Whether a consequence of an alien relative’s exclusion from the U.S. is going to levy an extreme, or extremely unusual, hardship upon that qualifying U.S. relative is highly subjective and reliant upon meeting the burden of persuasion. It is like I said; “It’s just not that simple.”

Dated this 16th day of May, 2015

/s/ Joseph P. Whalen

That’s my two-cents, for now!

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