

# ARTICLES

## ***IN RE L-A-C-: A PRAGMATIC APPROACH TO THE BURDEN OF PROOF AND CORROBORATING EVIDENCE IN ASYLUM PROCEEDINGS***

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#### INTRODUCTION

The burden of proof is a linchpin of litigation, “dictat[ing] who must produce evidence and ultimately persuade the fact-finder on which elements of the case.”<sup>1</sup> For instance, “if the plaintiff has the burden of proof, he loses if no evidence is introduced that X occurred; if the defendant has the burden of proof, he loses unless evidence is introduced that X did not occur.”<sup>2</sup> The purpose of the burden of proof is to “induce parties to provide information, starting usually with plaintiffs.”<sup>3</sup> As has been observed,

The basic function of the burden of proof is to allocate among the litigants the task of gathering and presenting evidence in the case. In an adversary system in which the court lacks independent investigatory powers, the court relies on the parties to inform it about the facts of the case. The burden of proof is the instrument for allocating the job of fact gathering to one or the other party.<sup>4</sup>

So conceived, the burden of proof actually consists, in the normal course, “of both the burden of production and the burden of persuasion.”<sup>5</sup> The “burden of persuasion” refers to “the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose,” while the

1. Kevin M. Clermont, *Death of Paradox: The Killer Logic Beneath the Standards of Proof*, 88 NOTRE DAME L. REV. 1061, 1118 (2013).

2. Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413, 415 (1997); see Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 654 (1997) (“[T]he burden of proof is a default rule instructing the court what to do if neither party presents the evidence. If the plaintiff has the burden of proof, she loses if no evidence is presented; if the defendant has the burden, he loses if no evidence is presented.”).

3. Tamar Frankel, *Presumptions and Burdens of Proof as Tools for Legal Stability and Change*, 17 HARV. J. L. & PUB. POL’Y 659, 762 (1994).

4. Hay, *supra* note 2, at 654.

5. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 518 n.213 (2013); see Kenneth S. Abraham, *Self-Proving Causation*, 99 VA. L. REV. 1811, 1839 (2013) (“Conventionally understood, the term ‘burden of proof’ refers, at the least, to the burden of persuasion, although it may include both the burden of production and the burden of persuasion.”).

“burden of production” refers to “a party’s obligation to come forward with evidence to support its claim.”<sup>6</sup> Although somewhat distinct, these burdens are also closely interrelated; “parties will have satisfied a production burden when they have presented evidence from which a reasonable fact finder could conclude that the burden of persuasion has been satisfied.”<sup>7</sup> In other words, “[t]he party bearing the burden of production loses if she fails to come forward with evidence sufficient to induce a reasonable fact finder to rule in her favor—even if her opponent remains silent,” whereas “[t]he party bearing the burden of persuasion loses if the totality of both parties’ evidence leaves the fact finder in equipoise regarding who should prevail.”<sup>8</sup>

Congress has statutorily allocated the burden of proof for immigration proceedings. The Government has the burden of proving that an alien, who was previously admitted to the United States, is deportable.<sup>9</sup> However, the alien bears the burden of proof in most other contexts: to establish admissibility or that she was previously lawfully admitted,<sup>10</sup> to demonstrate statutory eligibility for any forms of relief or protection sought,<sup>11</sup> and to establish that an ultimate exercise of discretion is warranted where discretionary relief is sought.<sup>12</sup> Thus, the allocation specified by Congress includes both a burden of persuasion and a burden of production.<sup>13</sup> Congress also incorporated specific provisions regarding the burden of proof, and what applicants must adduce to meet that burden, in the asylum statute. Congress placed the burden of proof on the applicant for asylum and provided that testimony alone *may* be sufficient to meet that burden in certain circumstances, but otherwise provided the immigration judge with broad discretion to require additional corroborating evidence for each claim.<sup>14</sup>

In practice, how does this burden operate? After the hearing on the application has closed, and the immigration judge is considering all the evidence, may the adjudicator determine that, the applicant failed to provide sufficient evidence to establish her claim even if she testified credibly? Where no

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6. *Dir., Office of Workers’ Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1995) (citing James Thayer, *EVIDENCE AT THE COMMON LAW* 355–384 (1898)).

7. Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 *VAND. L. REV.* 547, 565 (2013); see David S. Schwartz, *A Foundation Theory of Evidence*, 100 *GEO. L.J.* 95, 127 (2011) (“The burden of production in litigated cases requires that a claimant must produce evidence sufficient to support a finding under the applicable burden of persuasion on every element of his claim.”).

8. Chris Williams Sanchirico, *A Primary-Activity Approach to Proof Burdens*, 37 *J. LEGAL STUD.* 273, 273–74 (2008).

9. *See* 8 U.S.C. § 1229a(c)(3); 8 C.F.R. § 1240.8(a) (2020).

10. *See* 8 U.S.C. § 1229a(c)(2); 8 C.F.R. § 1240.8(b)–(c).

11. *See* 8 U.S.C. § 1229a(c)(4)(A)(i); 8 C.F.R. § 1240.8(d).

12. *See* 8 U.S.C. § 1229a(c)(4)(A)(ii); 8 C.F.R. § 1240.8(d).

13. *See* 8 U.S.C. § 1229a(c)(3)(A) (“No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.”); 8 U.S.C. § 1229a(c)(3)(B)–(C) (citing evidence to establish criminal convictions); *see also* 8 U.S.C. § 1229a(c)(4)(B) (“The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant’s application for relief or protection as provided by law or by regulation or in the instructions for the application form.”).

14. *See* 8 U.S.C. § 1158(b)(1)(B)(i)–(ii); 8 C.F.R. § 1208.13(a) (2020); *see also* 8 U.S.C. § 1229a(c)(4)(B).

relevant evidence was submitted from a witness with knowledge of the basis for the applicant's claim, may the adjudicator base a denial on that omission?<sup>15</sup> If the applicant submits letters and other documents from individuals who are aware of the alleged persecution, does the failure of that evidence to mention any of those acts mean the applicant cannot carry her burden?<sup>16</sup>

The courts of appeals are currently divided on these questions. The Third and Ninth Circuits have concluded that once an immigration judge reviews the totality of the evidence and determines that additional corroborating evidence is required under the statute, he must provide the applicant notice of that fact and an opportunity to obtain that evidence—or at least to explain why that evidence is not available.<sup>17</sup> The Board of Immigration Appeals, as well as the majority of courts of appeals, have rejected this interpretation of the statute, concluding instead that at the close of the merits hearing before the immigration judge, the application may be denied where insufficient evidence has been submitted in support of the applicant's claim.<sup>18</sup> These courts do not require the immigration judge to make a preliminary assessment of whether the applicant has carried her burden, and then provide notice of what evidence is necessary to meet that burden and an opportunity to submit such evidence. This conflict of statutory interpretation is relatively new, and has only recently engendered two petitions for writs of certiorari to the Supreme Court, both of which were denied.<sup>19</sup> This remains an issue of obvious importance to both applicants for asylum and the Government, with implications for the evidentiary requirements for asylum, the interpretation of how the burden of proof may be met, and the imposition of procedural requirements on immigration judges.

This article argues that the interpretation of the statute offered by the Third and Ninth Circuits is not required by either the plain text or the canon of constitutional avoidance. The better interpretation is that offered by the Board of Immigration Appeals, and adopted by the majority of the courts of appeals, which does not require an automatic continuance to obtain additional evidence before the immigration judge may deny the application for asylum. This pragmatic approach to corroboration, permitting additional time to gather evidence in extraordinary circumstances, is consistent with the language of the asylum statute's burden-of-proof provisions, statutory structure and context, and legislative history. It also does *not* run afoul of any

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15. *See Saravia v. U.S. Att'y Gen.*, 905 F.3d 729, 731–34 (3d Cir. 2018); *Bhattarai v. Lynch*, 835 F.3d 1037, 1040–42 (9th Cir. 2016).

16. *See Wei Sun v. Sessions*, 883 F.3d 23, 25–26 (2d Cir. 2018); *Bhattarai*, 835 F.3d at 1041–42, 1046–47.

17. *See Saravia*, 905 F.3d at 737–38; *Ren v. Holder*, 648 F.3d 1079, 1090–92 (9th Cir. 2011).

18. *See In re L-A-C-*, 26 I. & N. Dec. 516, 527 (BIA 2015); *see also Avelar-Oliva v. Barr*, 954 F.3d 757, 767–68 (5th Cir. 2020); *Uzodinma v. Barr*, 951 F.3d 960, 966–67 (8th Cir. 2020); *Wei Sun*, 883 F.3d at 30–31; *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015); *Gay v. Lynch*, 788 F.3d 519, 528–30 (6th Cir. 2015); *Abraham v. Holder*, 647 F.3d 626, 633 (7th Cir. 2011).

19. *See Wei Sun v. Sessions*, 883 F.3d 23 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 413 (2018); *Silais v. Sessions*, 855 F.3d 736 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 976 (2018).

constitutional prohibitions; the asylum process is embedded with numerous points of notice to applicants regarding their obligations to prove their cases—undermining the claim that even more notice must be provided to meet due process concerns.

This article proceeds in four Sections. Part I lays out a historical overview of the law before passage of the REAL ID Act. This part provides the foundation for the article, as it was this history — both in terms of what it wanted to adopt and avoid—that Congress had in mind when legislating in 2005. Part II then shifts to that 2005 legislation, the REAL ID Act, where Congress enacted numerous amendments to the asylum statute governing, *inter alia*, burdens of proof, corroborating evidence, and credibility determinations. The intent behind those amendments was to establish uniform rules for the consideration of asylum applications, while also rejecting prior court-imposed procedural requirements on immigration judges and the Board. Part III addresses how the new provision on the burden of proof and corroborating evidence has been interpreted by the agency and by the courts of appeals. The Board has interpreted that provision as permitting an immigration judge to deny an application without advance notice of what specific evidence may be required for the applicant to carry her burden of proof, and the majority of the courts have adopted this approach. The Third and Ninth Circuits have adopted a different interpretation, but as noted at the close of Part III, the conflict may not be as stark as it first appears. Finally, Part IV turns to the fundamental question—is the statute ambiguous and, if so, is the Board’s interpretation reasonable? This article rejects the conclusions of the Third and Ninth Circuits that the statute unambiguously mandates a set sequential process before the agency may deny an application for failure of proof. The statute is at least silent on this question, although an argument could be made that it unambiguously *forecloses* the interpretations of these two courts. In light of the statutory silence on this matter, the Board’s pragmatic approach is reasonable and permissible upon consideration of the relevant *Chevron* factors.

#### I. THE BURDEN-OF-PROOF AND CORROBORATION REQUIREMENTS BEFORE THE REAL ID ACT OF 2005

This article is fundamentally concerned with the proper interpretation of a specific statutory provision governing submission of corroborating evidence for asylum claims, as enacted by the REAL ID Act. History is, however, integral to this inquiry. What the law previously required, and how the courts of appeals and agency interpreted those requirements, informs what Congress intended to accomplish in 2005—both in terms of what it wanted to adopt and what it wanted to avoid. Subsection A provides an overview of the relevant statutory and regulatory framework for establishing asylum eligibility, as it existed prior to the REAL ID Act. Subsection B turns to the Board of Immigration Appeals’ interpretation of that framework as it relates to

corroborating evidence. Finally, Subsection C shifts to the judiciary and addresses how the Board's approach to corroboration was received in the courts of appeals. This section provides the foundation for understanding the REAL ID Act. As the next section will make clear, the REAL ID Act was a corrective to aberrant precedent in the courts of appeals and an attempt to establish the Board's framework as the uniform standard governing the issue of corroboration.

### A. *The Statutory and Regulatory Framework Governing Asylum Eligibility*

The Immigration and Nationality Act (INA) provides that “[t]he Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General . . . if the Attorney General determines that such alien is a refugee . . . .”<sup>20</sup> The INA defines a “refugee” as

[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .<sup>21</sup>

Asylum may be sought affirmatively by the applicant before an asylum officer, *i.e.*, prior to the initiation of any removal proceedings.<sup>22</sup> Alternatively, asylum may be sought “defensively” through an application submitted to the immigration judge once removal proceedings have been initiated.<sup>23</sup> Wherever filed, the substantive criteria for determining whether the applicant established eligibility for relief is the same.

An applicant for asylum may establish eligibility for that form of relief by showing that she “has suffered past persecution or because he or she has a well-founded fear of future persecution.”<sup>24</sup> Persecution is not defined in the INA itself,<sup>25</sup> but courts have characterized it as an “extreme concept” that “includes ‘the threat of death, the threat or infliction of torture, and the threat

20. 8 U.S.C. § 1158(b)(1). There are certain exceptions to this general rule, which relate to both an alien's eligibility to *apply* for asylum and an alien's ability to establish *eligibility* for asylum. *See* 8 U.S.C. § 1158(a)(2)(A)–(C) (citing statutory bars to eligibility to *apply* for asylum); 8 U.S.C. § 1158(b)(2)(A)–(B) (citing statutory bars to asylum eligibility).

21. 8 U.S.C. § 1101(a)(42)(A).

22. *See* 8 C.F.R. § 208.2 (2020) (citing jurisdiction of Refugee, Asylum and International Operations (RAIO) of the Immigration and Naturalization Service); 8 C.F.R. § 208.9 (2020) (citing procedures for interviews before an asylum officer).

23. *See* 8 C.F.R. § 208.2(b) (2020).

24. 8 C.F.R. § 208.13(b) (2020).

25. *See* *Marquez v. INS*, 105 F.3d 374, 379 (7th Cir. 1997) (“Congress has left defining the word ‘persecution’ to the courts.”).

or infliction of injury to one's person or one's liberty on account of a protected ground."<sup>26</sup> The concept of persecution excludes lesser harm, threats, and mistreatment, even where that harm violates widely-accepted norms.<sup>27</sup>

A finding of past persecution may, standing alone, be insufficient to establish eligibility for relief; asylum is ultimately a forward-looking form of relief concerned with what will happen if the applicant is removed to the country of her nationality.<sup>28</sup> But, a finding of past persecution does give rise to a presumption of a well-founded fear of persecution, except in cases where the fear of persecution is not related to the persecution already suffered.<sup>29</sup> This presumption may be rebutted if, by a preponderance of the evidence, the Government establishes either that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution,"<sup>30</sup> or if "[t]he applicant could avoid future persecution by relocating to another part of the applicant's country of nationality . . . and under all circumstances, it would be reasonable to expect the applicant to do so."<sup>31</sup> That said, a finding of past persecution may be sufficient to establish eligibility for asylum in some narrow circumstances, even in the absence of a well-founded fear of persecution. The agency may so conclude if the "applicant demonstrate[s] compelling reasons for being unwilling or unable to return to the country [of nationality] arising out of the severity of the past persecution,"<sup>32</sup> or because the applicant can establish "a reasonable possibility that he or she may suffer other serious harm upon removal to that country."<sup>33</sup>

In the absence of past persecution, the applicant may still be able to establish eligibility for asylum by establishing a well-founded fear of persecution, *i.e.*, a "reasonable possibility" of suffering persecution premised on one of

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26. *Kipkemboi v. Holder*, 587 F.3d 885, 888 (8th Cir. 2009) (quoting *Sholla v. Gonzales*, 492 F.3d 946, 951 (8th Cir. 2007)); see *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (citing persecution as an "extreme concept," characterized by "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive.") (internal quotation marks and citation omitted).

27. See *Shi v. U.S. Att'y. Gen.*, 707 F.3d 1231, 1235 (11th Cir. 2013) ("[P]ersecution is 'an extreme concept that does not include every sort of treatment our society regards as offensive.'" (citations omitted); *Sholla*, 492 F.3d at 951 ("Persecution is an extreme concept that excludes low-level intimidation and harassment.") (quoting *Shoaira v. Ashcroft*, 377 F.3d 837, 844 (8th Cir. 2004)) (citation omitted); *Fatin v. INS*, 12 F.3d 1233, 1240 n.10 (3d Cir. 1993) (citing persecution as an "extreme" concept that "does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.") (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)); *Bastanipour v. INS*, 980 F.2d 1129, 1133 (7th Cir. 1992) (distinguishing persecution "from mere discrimination or harassment"); cf. *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) ("Threats standing alone . . . constitute past persecution in only a small category of cases, and only when the threats are so menacing as to cause significant actual 'suffering or harm.'" (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)).

28. See *In re N-M-A-*, 22 I. & N. Dec. 312, 318 (BIA 1998) ("Asylum is a prophylactic protection for those who might face future persecution.").

29. See 8 C.F.R. § 208.13(b)(1) (2020).

30. 8 C.F.R. § 208.13(b)(1)(i)(A).

31. 8 C.F.R. § 208.13(b)(1)(i)(B); see 8 C.F.R. § 208.13(b)(1)(ii) (placing the burden on the government to rebut a well-founded fear of persecution once past persecution has been established).

32. 8 C.F.R. § 208.13(b)(1)(iii)(A); see generally *In re S-A-K- & H-A-H-*, 24 I. & N. Dec. 464 (BIA 2008); *In re Chen*, 20 I. & N. Dec. 16 (BIA 1989).

33. 8 C.F.R. § 208.13(b)(1)(iii)(B); see generally *In re L-S-*, 25 I. & N. Dec. 705 (BIA 2012).

the statutorily protected grounds.<sup>34</sup> This “reasonable possibility” depends on both objective evidence in the country of nationality that supports the general and specific elements of the applicant’s claim, as well as the subjective fear of the applicant, and could be met with evidence establishing something significantly less than a more-likely-than-not probability of persecution.<sup>35</sup>

Prior to the REAL ID Act, the INA did not expressly allocate the burden of proving eligibility for asylum, but the accompanying regulations provided that “[t]he burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in [the INA].”<sup>36</sup> The regulations further provided that “[t]he testimony of the applicant, if credible, *may* be sufficient to sustain the burden of proof without corroboration.”<sup>37</sup> The regulations also made clear that the decision to grant or deny asylum is ultimately left to the discretion of the Attorney General, acting through his delegates.<sup>38</sup> In other words, the application may be denied even if the applicant otherwise established statutory eligibility for relief.<sup>39</sup>

#### B. *The Board of Immigration Appeals’ Approach to the Burden of Proof and Corroborating Evidence*

Asylum cases present an inherent problem: “the inescapable inability of the [government] to demonstrate that the petitioner’s recital of past persecution is false. The events are distant and an investigation to determine truth is impracticable.”<sup>40</sup> For that reason, the governing law places the burden of proof on the applicant to persuade “the [immigration judge] that his evidence is credible,” while allowing the judge to “evaluate assertions of past persecution in light of the strength and weakness of such other evidence as the petitioner may present.”<sup>41</sup> But what of that “other evidence”? As the Ninth

34. 8 C.F.R. § 208.13(b)(2)(i) (2020).

35. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); see also Patrick J. Glen, *Is the United States Really Not a Safe Third Country?: A Contextual Critique of the Federal Court of Canada’s Decision in Canadian Council for Refugees, et al. v. Her Majesty the Queen*, 22 GEO. IMMIGR. L.J. 587, 592 (2008) (“Although the exact parameters of a ‘well-founded fear’ have not been delineated, the United States Supreme Court has determined that there is no necessary numeric ‘floor’ on what probability of persecution may constitute a well-founded fear of persecution.”).

36. 8 C.F.R. § 208.13(a) (2020).

37. *Id.* (emphasis added).

38. See 8 C.F.R. § 208.14(a) (2020) (“[A]n immigration judge may grant or deny asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act.”); 8 C.F.R. § 208.14(b) (explaining that it is the same, for asylum officers); see also 8 U.S.C. § 1158(b)(1) (“The Secretary of Homeland Security or the Attorney General *may* grant asylum. . . .”) (emphasis added).

39. See, e.g., 8 C.F.R. § 208.14(a) (noting that denial may occur even when the applicant otherwise “qualifies as a refugee”); see also *Alsaghladi v. Gonzales*, 450 F.3d 700 (7th Cir. 2006) (upholding discretionary denial of asylum); cf. *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007) (“It is rare to find a case where an IJ finds a petitioner statutorily eligible for asylum and credible, yet exercises his discretion to deny relief.”).

40. *Mejia-Paiz v. INS*, 111 F.3d 720, 722 (9th Cir. 1997); see *Abovian v. INS*, 257 F.3d 971, 976 (9th Cir. 2001) (Kozinski, J., dissenting from the denial of reh’g en banc) (“The specific facts supporting a petitioner’s asylum claim—when, where, why and by whom he was allegedly persecuted—are peculiarly within the petitioner’s grasp. By definition, they will have happened at some point in the past—often many years ago—in a foreign country.”).

41. *Mejia-Paiz*, 111 F.3d at 722.

Circuit has observed, “[a]uthentic refugees rarely are able to offer direct corroboration of specific threats or specific incidents of persecution.”<sup>42</sup> This may be so because such evidence does not in fact exist, or because of the nature of the applicant’s flight from her home country:

It is obvious that one who escapes persecution in his or her own land will rarely be in a position to bring documentary evidence or other kinds of corroboration to support a subsequent claim for asylum. . . . Common sense establishes that it is escape and flight, not litigation and corroboration, that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution.<sup>43</sup>

In *In re Mogharrabi*, the Board also recognized these practical considerations and the evidentiary limitations that can plague genuine asylum applicants in proving their claims.<sup>44</sup> For this reason, the Board had long held that an applicant’s “own testimony may in some cases be the only evidence available, and it can suffice [to carry the applicant’s burden] where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear.”<sup>45</sup> Despite this allowance that “the lack of [corroborating] evidence will not necessarily be fatal to the application,” the Board also announced that “every effort should be made to obtain such evidence.”<sup>46</sup> And although the absence of such evidence *need* not be fatal to the application, it *could* be, especially in cases where testimony is in tension or where the claim is based on “generalized statements of fear. . . .”<sup>47</sup>

The Board revisited the corroboration issue two years later in *In re Dass*, clarifying the general principles it had announced in *In re Mogharrabi*. First, the Board highlighted the connection between the burden-of-proof and corroborating evidence: “[a]s an asylum applicant bears the evidentiary burden of proof and persuasion, where there are significant, meaningful evidentiary gaps, applications will ordinarily have to be denied for failure of proof.”<sup>48</sup> Second, “the general rule is that [corroborating evidence] should be presented where available.”<sup>49</sup> This rule, rooted in the allocation of the burden of proof, stemmed too from practical considerations. “Without background information against which to judge the alien’s testimony, it may well be difficult to

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42. *Turcios v. INS*, 821 F.2d 1396, 1402 (9th Cir. 1987).

43. *Senathirajah v. INS*, 157 F.3d 210, 215–16 (3d Cir. 1998).

44. *In re Mogharrabi*, 19 I. & N. Dec. 439, 445 (BIA 1987) (“In determining whether the alien has met his burden of proof, we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution.”).

45. *Id.* at 445 n.4 (citing Int’l Refugee Org. [IRO], *Manual for Eligibility Officers*, No. 175, ch. IV, Annex 1, Pt. 1, § C19, p. 24 (1950)).

46. *Id.* at 445.

47. *Id.* at 446 (“[T]he allowance for lack of corroborative evidence does not mean that ‘unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant,’” and “very generalized statements of fear will in most cases not suffice.”).

48. *In re Dass*, 20 I. & N. Dec. 120, 124 (BIA 1989).

49. *Id.* at 124.

evaluate the credibility of the testimony.”<sup>50</sup> This was all the more important depending on the nature of the claim being raised: “[t]he more sweeping and general a claim, the clearer the need for an asylum applicant to introduce supporting evidence or to explain its absence.”<sup>51</sup>

The Board synthesized these cases in *In re S-M-J-*, breaking the question of corroborating evidence into two discrete questions: corroboration of “general country conditions” and corroboration of “evidence to support the alien’s particular claim.”<sup>52</sup> First, regarding general country conditions, the Board relied on the language of the regulation, which provided that “[t]he testimony of the applicant, if credible *in light of general conditions in the applicant’s country of nationality . . .* may be sufficient to sustain the burden of proof without corroboration.”<sup>53</sup> The regulatory language presupposes that there is evidence of “general conditions,” and “[t]herefore, general background information about a country, where available, must be included in the record as a foundation for the applicant’s claim.”<sup>54</sup> This evidence would presumably relate to both general country conditions and the specific facts of the applicant’s claim, especially where those facts would be easily subject to independent verification.<sup>55</sup> Proffer of such evidence is only the general rule; however, “[i]f such evidence is unavailable, the applicant must explain its unavailability, and the Immigration Judge must ensure that the applicant’s explanation is included in the record.”<sup>56</sup> In other words, applicants should provide corroborating evidence of general country conditions and related specifically verifiable facts *so long as* that evidence is reasonably available; if the applicant claims the evidence is unavailable and the immigration judge agrees, the failure to corroborate will not be held against the applicant.

Second, regarding the particular claim raised by the applicant, “[w]here the record contains general country condition information, and an applicant’s claim relies primarily on personal experiences not reasonably subject to verification, corroborating documentary evidence of the asylum applicant’s particular experience is not required.”<sup>57</sup> That is not to say, however, that *no* corroborating evidence is required.

[W]here it is reasonable to expect corroborating evidence for certain alleged facts pertaining to the specifics of an applicant’s claim, such evidence should be provided. That is, an asylum applicant should provide documentary support for material facts which are central to his or her claim and easily subject to verification, such as evidence of his or

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50. *Id.*

51. *Id.* at 125.

52. *In re S-M-J-*, 21 I. & N. Dec. 722, 724–25 (BIA 1997) (capitalization altered).

53. *Id.* at 724 (quoting 8 C.F.R. § 208.13(a) (1997)) (emphasis added).

54. *Id.*

55. *Id.* (citing *In re Dass*, 20 I. & N. Dec. 120, 125 (BIA 1989)).

56. *Id.*

57. *Id.* at 725.

her place of birth, media accounts of large demonstrations, evidence of a publicly held office, or documentation of medical treatment.<sup>58</sup>

As an example, the Board posed a hypothetical concerning a union activist basing her claim in part on having held the vice-presidency of the union; such an applicant “should provide some corroborating evidence indicating that she held the office of vice-president or an explanation of why she did not provide such corroborating evidence.”<sup>59</sup> But as the concluding phrase makes clear, failure to submit such evidence will not necessarily be fatal to the applicant’s claim. The applicant may provide an explanation for why the evidence was not submitted or why it might be unavailable, which the immigration judge may then credit (or not).<sup>60</sup> Moreover, “specific documentary corroboration of an applicant’s particular experiences is not required unless the supporting documentation is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers.”<sup>61</sup>

The Board accordingly struck a balance in its pre-REAL ID Act corroboration precedents. Such evidence was generally required in order to establish a foundation for the applicant’s claim and to corroborate specific facts and claims that were subject to reasonable verification. But the absence of such evidence was not necessarily fatal to the applicant’s claim, so long as the evidence was unavailable or unobtainable. The Board’s precedent thus recognized the importance of corroborating claims, while also appreciating the inherent evidentiary limitations faced by most asylum applicants.

### C. *Corroboration in the Courts of Appeals*

The Board’s pre-REAL ID Act framework for corroborating evidence received a mixed reception in the courts of appeals. Several courts of appeals wholly accepted that framework, including the requirement that an otherwise credible applicant must provide reasonably available corroborating evidence, while others rejected the Board’s approach. The Second and Third Circuits provided the most comprehensive rationales for deferring to the Board, concluding that “the standard developed and applied by the BIA in its recent cases . . . is consistent with the INS regulations, international legal standards, and our precedent and therefore is entitled to deference from this court.”<sup>62</sup>

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 726.

62. *Diallo v. INS*, 232 F.3d 279, 285–86 (2d Cir. 2000); *see Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001) (“We . . . hold that the BIA may sometimes require otherwise-credible applicants to supply corroborating evidence in order to meet their burden of proof.”); *see also Kayembe v. Ashcroft*, 334 F.3d 231, 238 (3d Cir. 2003) (applying the Board’s corroboration framework, as construed in *Abdulai*); *Guan Shan Liao v. U.S. Dep’t. of Justice*, 293 F.3d 61, 71 (2d Cir. 2002) (reciting and applying the Board’s corroboration framework).

First, the Second and Third Circuits concluded that the Board's interpretation was consistent with the language and the purpose of the regulations. In directing that testimony *may* be sufficient to carry an applicant's burden of proof, the regulations used the "permissive term 'may,'" which "implies that an applicant's credible testimony may not always satisfy the burden of proof."<sup>63</sup> According to the Third Circuit, "[s]aying that something may be enough is not the same as saying that it is *always* enough; in fact, the most natural reading of the word 'may' in this context is that credible testimony is neither *per se* sufficient nor *per se* insufficient. In other words, 'it depends.'"<sup>64</sup> This reading of the text of the regulation was supported by its apparent purpose: "the regulations were . . . drafted to ensure that lack of corroboration would not necessarily defeat an asylum claim, not to excuse the requirement of corroboration in all cases in which an applicant's testimony is credible."<sup>65</sup>

Second, this standard was consistent with international standards, including the United Nations High Commissioner for Refugees *Handbook*.<sup>66</sup> That *Handbook* notes that applicants should "[m]ake an effort to support [their] statements by any available evidence and give a satisfactory explanation for any lack of evidence."<sup>67</sup> That said, the *Handbook* also recognizes that applicants "may not be able to support [their] statements by documentary or other proof" and thus should "be given the benefit of the doubt" where their "account appears credible."<sup>68</sup> The Board's framework in *In re S-M-J* "adheres to" the *Handbook*'s general parameters,<sup>69</sup> since it "holds a failure to corroborate against an applicant [only] when: (1) it is 'reasonable to expect' corroboration; and (2) the applicant has no satisfactory explanation for not doing so. . . ."<sup>70</sup>

Finally, the Second and Third Circuits noted that the Board's framework was either consistent with, or not *inconsistent* with, existing precedent in those circuits. In *Diallo*, the Second Circuit observed that its cases "establish simply that corroboration is not always required where the applicant's testimony is credible and detailed, not that corroboration can never be required under these circumstances."<sup>71</sup> Characterizing its prior cases, the Second Circuit concluded that "[w]e have stopped short of a blanket holding that credible testimony is automatically sufficient and renders corroborating

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63. *Diallo*, 232 F.3d at 286.

64. *Abdulai*, 239 F.3d at 552.

65. *Diallo*, 232 F.3d at 286 (internal citation omitted).

66. See UN HIGH COMM'R FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (2019) (hereinafter "Handbook"), <https://www.unhcr.org/en-us/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>.

67. *Id.* ¶ 205(ii).

68. *Id.* ¶ 196.

69. *Abdulai*, 239 F.3d at 553 (quoting *Diallo*, 232 F.3d at 286).

70. *Id.*

71. *Diallo v. INS*, 232 F.3d 279, 286 (2d Cir. 2000).

evidence unnecessary . . . a rule that would run contrary to the permissive language of the applicable INS regulations.”<sup>72</sup>

Beyond the Second and Third Circuits, the Fifth, Sixth, and Eighth Circuits largely deferred to *In re S-M-J*,<sup>73</sup> while the Eleventh Circuit applied a similar rule.<sup>74</sup> As the Sixth Circuit noted in *Dorosh v. Ashcroft*,

We . . . conclude that the BIA corroboration rule does not contradict the language [of the regulations]. Neither does it place unreasonable demands on an applicant since supporting documentation must be provided only if it “is of the type that would normally be created or [sic] available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers.”<sup>75</sup>

In contrast, the Seventh and Ninth Circuits declined to adopt the Board’s framework wholesale, though the approaches of these two courts differ from one another. The Seventh Circuit concluded that a failure to corroborate may doom a case where there are otherwise issues with credibility and the sufficiency of evidence, but was skeptical that corroboration may be required where an alien has otherwise testified credibly. As the Seventh Circuit observed in *Uwase v. Ashcroft*, “[c]orroborating evidence is essential to bolster an otherwise unconvincing case, but when an asylum applicant does testify credibly, ‘it is not necessary for [her] to submit corroborating evidence in order to sustain her burden of proof.’”<sup>76</sup> The court’s conclusion on this point seems to have been based on what it deemed “tension with the regulation.”<sup>77</sup> However, the Seventh Circuit never explicitly stated what tension it saw between the regulation and *In re S-M-J* in any of its corroboration decisions. This omission is glaring, especially in light of the reasoning of the Second and Third Circuits finding *support* for *In re S-M-J* in the regulatory language.

In any event, the Seventh Circuit did not erect a per se rule that a credible applicant could never be required to provide additional corroboration, which ultimately leads to results similar to those of the circuits previously

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72. *Id.*; accord *Abdulai*, 239 F.3d at 553–54.

73. See *Rui Yang v. Holder*, 664 F.3d 580, 585–87 (5th Cir. 2011) (joining the majority position and deferring to *In re S-M-J*); see also *Dorosh v. Ashcroft*, 398 F.3d 379, 382 (6th Cir. 2004); *Pilica v. Ashcroft*, 388 F.3d 941, 954 (6th Cir. 2004) (“Because Pilica’s testimony plausibly could be viewed as incredible, and certainly could be viewed as inconsistent or incoherent, a fact finder reasonably could find that [his] testimony, absent corroboration, was insufficient to meet his burden of proof.”); *El-Sheikh v. Ashcroft*, 388 F.3d 643, 647 (8th Cir. 2004) (“[W]e accept the BIA’s position regarding corroborative evidence as articulated in *S-M-J* . . .”).

74. See *Yang v. U.S. Att’y Gen.*, 418 F.3d 1198, 1201 (11th Cir. 2005) (“Uncorroborated but credible testimony may be sufficient to sustain the burden of proof for demonstrating eligibility for asylum. The weaker an applicant’s testimony, however, the greater the need for corroborative evidence.”) (internal citations omitted).

75. *Dorosh*, 398 F.3d at 382 (citing *Perkovic v. INS*, 33 F.3d 615 (6th Cir. 1994)).

76. *Uwase v. Ashcroft*, 349 F.3d 1039, 1041 (7th Cir. 2003) (quoting *Georgis v. Ashcroft*, 328 F.3d 962, 969 (7th Cir. 2003)).

77. *Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004).

discussed. Its decisions “suggested that the importance of corroboration depends in part on the degree of specificity and detail in a petitioner’s story.”<sup>78</sup> In essence, the Seventh Circuit required the agency to follow a distinct process before it would uphold a corroboration determination on review—at least in cases where the applicant was otherwise credible. Under this approach, the agency had to explain its use of the corroboration rule by, at a minimum: making “an explicit credibility finding,” explaining “why it is reasonable to expect additional corroboration,” and explaining “why the petitioner’s explanation for not producing that corroboration is inadequate.”<sup>79</sup> In the end, the Seventh Circuit’s approach, while skeptical of the broader rule of the agency, represented a case-by-case analysis that was often as likely to reach the same result as that reached by those circuits that deferred more wholly to *In re S-M-J*.

The same cannot be said of the Ninth Circuit. That court drew a sharp line between using a failure to corroborate as part of the general credibility determination and using that failure to find an otherwise credible alien failed to carry his or her burden of proof. In the former case, the Ninth Circuit concluded that the regulation “plainly indicates that if the trier of fact either does not believe the applicant or does not know what to believe, the applicant’s failure to corroborate his testimony can be fatal to his asylum application.”<sup>80</sup> Even in such cases, however, the Ninth Circuit placed strictures on the agency’s ability to use a failure to corroborate: “[t]he petitioner must be given an opportunity at his [removal] hearing to explain his failure to produce material corroborating evidence”; “the corroborating evidence must be both material to the petitioner’s asylum claim and non-duplicative of other corroboration”; and “the evidence must be easily available.”<sup>81</sup> Thus, “where the [immigration judge] has reason to question the applicant’s credibility, and the applicant fails to produce non-duplicative, material, easily available corroborating evidence and provides no credible explanation for such failure, an adverse credibility finding will withstand appellate review.”<sup>82</sup>

However, where the agency fails to make an adverse credibility determination, or explicitly determines that the alien testified credibly, it cannot then deny the application based on a finding that the applicant did not carry his or

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78. *Gontcharova v. Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004); see *Ahmed v. Ashcroft*, 348 F.3d 611, 618–19 (7th Cir. 2003) (relying on a lack of corroboration where the alien’s testimony “was almost entirely devoid of dates or other specific details”); *Bevc v. INS*, 47 F.3d 907, 910 (7th Cir. 1995) (“The general evidence alone does not show that she personally is at great risk, and Bevc offered no other evidence to corroborate her fear of persecution.”); *Carvajal-Munoz v. INS*, 743 F.2d 562, 577 (7th Cir. 1984) (“We think that petitioner’s claim falls short because his statements disclose insufficient *specific, detailed* facts to support it.”).

79. *Gontcharova*, 384 F.3d at 877 (citing *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)).

80. *Sidhu v. INS*, 220 F.3d 1085, 1090 (9th Cir. 2000).

81. *Id.* at 1091.

82. *Id.* at 1092; see *Chebchoub v. INS*, 257 F.3d 1038, 1044–45 (9th Cir. 2001) (applying this rule to deny petition for review, where “the Board had reason to question Chebchoub’s credibility, it supplied specific reasons that related to the basis for his claim, and he failed to produce non-duplicative, material, easily available corroborating evidence and gave no explanation for such failure.”).

her burden of proof by failing to submit corroborating evidence.<sup>83</sup> The Ninth Circuit based its approach not on the text of the regulation itself, or on any conclusion that the Board's interpretation was in fact *impermissible*, but rather on the court's own extant precedent.<sup>84</sup>

The rule as announced by the Ninth Circuit in *Ladha* stemmed from three interrelated lines of cases. The first line of cases “emphasize[d] the difficulty of proving specific threats by persecutors, and emphasize[d] that credible testimony as to a threat is sufficient to prove that the threat was made (though further proof that the threat is ‘serious’ may be required before relief is granted).”<sup>85</sup> The rationale of those cases turned on a point already made in this article, that “[a]uthentic refugees rarely are able to offer direct corroboration of specific threats’ and that ‘[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution.”<sup>86</sup> The second line of cases turned away from the specific facts undergirding an applicant's claim, and instead, focused on the general objective evidence of country conditions, while assuming that all other facts relating to a claim for asylum could be established “by credible testimony alone if corroborative evidence is ‘unavailable.’”<sup>87</sup> The third line, perhaps the most important for the Ninth Circuit's development of its rule, “makes clear that when an alien credibly testifies to certain facts, those facts are deemed true, and the question remaining to be answered becomes whether these facts, and their reasonable inferences, satisfy the elements of the claim for relief. No further corroboration is required.”<sup>88</sup> Extrapolated from these cases and succinctly stated, the pre-REAL ID Act rule in the Ninth Circuit was that “an alien's testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified without the need for any corroboration.”<sup>89</sup>

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83. See, e.g., *Kataria v. INS*, 232 F.3d 1107, 1114 (9th Cir. 2000) (“Because Kataria's testimony is deemed to be credible, the BIA erred by requiring him to produce corroborating evidence.”).

84. See *Ladha v. INS*, 215 F.3d 889, 898 (9th Cir. 2000) (quoting *Cordon-Garcia v. INS*, 204 F.3d 985, 992 (9th Cir. 2000)) (“We are not free to consider as an open question whether the BIA has hit upon a permissible interpretation of the INA, for the law we must follow is already set out for us: ‘this court does not require corroborative evidence’ from applicants for asylum and withholding of deportation who have testified credibly.”).

85. *Ladha*, 215 F.3d at 899 (citing *Lopez-Reyes v. INS*, 79 F.3d 908, 912 (9th Cir. 1996); see also *Artiga Turcios v. INS*, 829 F.2d 720, 723 (9th Cir. 1987); *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285, 1288 (9th Cir. 1984)).

86. *Ladha*, 215 F.3d at 900 (quoting *Bolanos-Hernandez*, 767 F.2d at 1285).

87. *Id.* at 900 (citing, *inter alia*, *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991) (“The objective standard may be satisfied with the applicant's testimony alone if documentary evidence is unavailable.”); see *Limsico v. INS*, 951 F.2d 210, 212 (9th Cir. 1991) (quoting *Estrada-Posadas v. INS*, 924 F.2d 916, 918–19 (9th Cir. 1991) (“Where corroborating documentary evidence is unavailable, an alien's testimony alone will suffice to prove a well-founded fear, but only if it is ‘credible, persuasive, and specific.’”)).

88. *Ladha*, 215 F.3d at 900 (citing, *inter alia*, *Yazitchian v. INS*, 207 F.3d 1164, 1168 (9th Cir. 2000) (“Because the immigration judge found the Yazitchians' testimony credible, and the BIA did not make a contrary finding, we must accept as undisputed the facts as petitioners testified to them.”) (internal quotation marks omitted); *Del Carmen Molina v. INS*, 170 F.3d 1247, 1249 n.2 (9th Cir. 1999) (“Because of the IJ's finding that [petitioner's] testimony was credible, this uncontradicted testimony must be taken as true” and petitioner's “actual, uncontradicted and credible testimony did establish past persecution.”)).

89. *Ladha*, 215 F.3d at 901.

## II. THE REAL ID ACT OF 2005

The REAL ID Act of 2005 sought, among other ends, to remedy the divergent approaches to corroboration then surfacing in the courts of appeals.<sup>90</sup> The terrorist attacks of September 11, 2001, were a main motivating factor behind the Act, particularly due to fears that “terrorist aliens have exploited our asylum laws to enter and remain in the United States.”<sup>91</sup> Many of the amendments made by the REAL ID Act were meant to limit the possibility of fraudulent asylum applications by strengthening and establishing uniform standards for consideration of such applications. The Conference Report observed that “[a]s there are no explicit evidentiary standards for granting asylum in the INA, standards for determining the credibility of an asylum applicant and the necessity for evidence corroborating an applicant’s testimony have evolved through the case law of the Board . . . and federal courts.”<sup>92</sup> But the Report also observed that those “standards are not consistent across federal appellate courts,” and that “different results have been reached in similar cases, depending on the court that hears the case.”<sup>93</sup> Accordingly, the main focus of the asylum amendments was to “resolve[] conflicts between administrative and judicial tribunals with respect to standards to be followed in assessing asylum claims.”<sup>94</sup>

First, the REAL ID Act enacted a statutory provision regarding the burden of proof and what is required for an applicant to carry that burden. “The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title.”<sup>95</sup> That provision also requires an applicant to establish that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.”<sup>96</sup> The language discussing “at least one central reason” for persecution was meant to address “mixed motive” cases, “where there is more than one possible motive for harm, one protected, others not.”<sup>97</sup> As with much of the REAL ID Act, this provision was necessary to remedy two anomalous strains in the Ninth Circuit’s case law: (1) its conclusion that asylum eligibility could be established where the protected ground was only incidental or tangential to the harm the applicant alleged or feared;<sup>98</sup> and (2) the presumption of a persecutory motive the court

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90. H.R. REP. NO. 109–72, at 165–66 (2005) (Hereinafter “Conf. Rep.”).

91. *See id.* at 160–61 (providing examples of such abuse).

92. *Id.* at 161.

93. *Id.*

94. *Id.* at 162.

95. 8 U.S.C. § 1158(b)(1)(B)(i) (codifying REAL ID Act, Div. B, 119 Stat. at 303).

96. *Id.*

97. Conf. Rep., *supra* note 90, at 162.

98. *Id.* at 162–63; compare *Briones v. INS*, 175 F.3d 727 (9th Cir. 1999) (finding a statutorily protected ground was established by a government informer, where the persecutor may have attributed a political motivation to the informer’s actions and regardless of any political opinions actually held by the informer), with *Ambartsoumian v. Ashcroft*, 388 F.3d 85, 91 (3d Cir. 2004) (denying application alleging

applied in cases where there was a lack of evidence regarding the motivation for the persecution.<sup>99</sup>

Second, Congress addressed the considerations in the Act that should inform an adverse credibility determination, “codif[ying] factors identified in case law on which an adjudicator may make a credibility determination”:<sup>100</sup>

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s written and oral statements . . . , the internal consistency of each such statement, the consistency of such statements with other evidence of record . . . , and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.<sup>101</sup>

This statutory standard was “needed to address a conflict on th[e] issue between the Ninth Circuit on one hand and other circuits and the BIA,” both in regards to application of the standard of review and the specific criteria for reversing an adverse credibility determination.<sup>102</sup> A minority of judges on the Ninth Circuit had long noted the incompatibility of its adverse-credibility precedent with the governing standard of review and the decisions of other courts of appeals—but the issue had never secured enough votes to be resolved by that court en banc.<sup>103</sup> Noting the import of this section, a panel of the court observed:

The terms of this section . . . are a welcome corrective, which . . . will mean that in the future only the most extraordinary circumstances will justify overturning an adverse credibility determination. Such high deference is what the law requires today, though in this case, and in the

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persecution on account of ethnicity, where the alleged persecution was “mainly because he had failed to obtain proper legal documents and permission,” and not because of his ethnicity).

99. Conf. Rep., *supra* note 90, at 163–65; see *Blanco-Lopez v. INS*, 858 F.2d 531, 534 (9th Cir. 1988) (explaining that if “there is no evidence of a legitimate prosecutorial purpose for a government’s harassment of a person . . . there arises a presumption that the motive for harassment is political.”); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (“When a government exerts its military strength against an individual or a group within its population and there is no reason to believe that the individual or group has engaged in any criminal activity or other conduct that would provide a legitimate basis for governmental action, the most reasonable presumption is that the government’s actions are politically motivated.”); see also Conf. Rep., *supra* note 90, at 165 (“The ‘central reason’ standard will eliminate this presumption, and require aliens who allege persecution because they have been erroneously identified as terrorists to bear the same burden as all other asylum applicants . . .”).

100. Conf. Rep., *supra* note 90, at 166–67.

101. 8 U.S.C. § 1158(b)(1)(B)(iii).

102. Conf. Rep., *supra* note 90, at 167.

103. See, e.g., *Abovian v. INS*, 257 F.3d 971, 971–81 (9th Cir. 2001) (Kozinski, J., dissenting from denial of reh’g en banc) (noting incompatibility of Ninth Circuit precedent with the substantial evidence standard of review and the precedent of other courts of appeals).

thousands of other petitions filed before the effective date of the Act, our precedent frustrates its expression.<sup>104</sup>

Finally, the Act clarified when corroborating evidence is necessary. “With regard to sufficiency of the evidence . . . the BIA and the federal courts agree that credible testimony alone may suffice to sustain the applicant’s burden of proof in some cases, but disagree on when credible testimony alone can meet the burden and when corroboration is needed.”<sup>105</sup> Accordingly, the REAL ID Act enacted a new provision directly addressing the issue of corroborating evidence and making clear that even an applicant who testified credibly could be *required* to submit corroborating evidence of her claims:

The testimony of the applicant may be sufficient to sustain the applicant’s burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant’s testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant’s burden, the trier of fact may weigh the credible testimony along with other evidence of record. 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.<sup>106</sup>

Congress viewed this provision as codifying the existing regulatory requirements and the Board’s interpretation thereof.<sup>107</sup> The Conference Report observed that “[t]his clause recognizes that a lack of extrinsic or corroborating evidence will not necessarily defeat an asylum claim *where such evidence is not reasonably available to the applicant*.”<sup>108</sup> But that allowance “does not relieve the applicant from sustaining the burden of proof,” and where “an adjudicator determines that an asylum applicant should provide corroborating evidence for otherwise credible testimony, such corroborating evidence must be provided unless the applicant does not have it and cannot reasonably obtain it.”<sup>109</sup> As this language makes clear, the new corroboration provision was modeled explicitly on the standards articulated by the Board in *In re S-M-J*,<sup>110</sup> and Congress “anticipate[d] that [those standards], including the BIA’s conclusions on situations where corroborating evidence is or is not required, will guide the BIA and the courts in interpreting” the new clause.<sup>111</sup>

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104. *Jibril v. Gonzales*, 423 F.3d 1129, 1138 n.1 (9th Cir. 2005).

105. Conf. Rep., *supra* note 90, at 161.

106. 8 U.S.C. § 1158(b)(1)(B)(ii).

107. Conf. Rep., *supra* note 90, at 165–66.

108. *Id.* at 165 (emphasis added).

109. *Id.* at 165–66.

110. *Id.* at 166 (citing *In re S-M-J*, 21 I. & N. Dec. 722 (BIA 1997)).

111. *Id.*

### III. INTERPRETING THE REAL ID ACT CORROBORATION PROVISION

As the preceding section establishes, the REAL ID Act was meant to establish clear and uniform guidelines regarding how the agency should make credibility and corroboration determinations, as well as how the courts of appeals should review those determinations. This section tracks how well that goal has been met in the courts and before the agency, and updates this article in terms of decisional law. Subsection A recounts the initial decisions in the courts of appeals interpreting the corroboration provision, prior to the Board's precedential interpretation of that provision. Subsection B then turns to the Board's precedential decision in *In re L-A-C-*, with subsection C shifting back to the courts of appeals and how that decision was received under the *Chevron* framework. Finally, subsection D offers a tentative assessment of the conflict that has developed in the courts of appeals, and why it may nonetheless not be a compelling candidate for Supreme Court intervention.

#### A. *Initial Decisions: Competing Conceptions of Plain Meaning*

Before the Board issued a precedential decision interpreting Section 1158 (b)(1)(B)(ii), three courts of appeals, namely the Ninth, Seventh, and Sixth Circuits, addressed the issue in precedential decisions of their own.

In its decision in *Ren v. Holder*, the Ninth Circuit concluded that the statute requires advance notice to the applicant of the evidence that the immigration judge deems necessary to carry the applicant's burden of proof, prior to adjudicating the application, as well as an opportunity to explain the absence of the evidence and, if not unavailable, to obtain it.<sup>112</sup> In addressing the proper interpretation of the REAL ID Act's corroboration provision, the Ninth Circuit recognized that the provision abrogated its own prior case law, where it "had long held 'that the BIA may not require independent corroborative evidence from an asylum applicant who testifies credibly in support of his application.'"<sup>113</sup> The question for the court then became "whether under the REAL ID Act, the [immigration judge], having concluded that corroborative evidence was necessary, was required to give [the applicant] notice of that decision and provide him with an opportunity to obtain the required evidence or explain his failure to do so."<sup>114</sup>

The court resolved this question at step-one of *Chevron*, finding no ambiguity in the statute:

A plain reading of the statute's text makes clear that an [immigration judge] must provide an applicant with notice and an opportunity to either produce the evidence or explain why it is unavailable before ruling

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112. See *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011).

113. *Id.* at 1090 (quoting *Kataria v. INS*, 232 F.3d 1107, 1113 (9th Cir. 2000)).

114. *Id.*

that the applicant has failed in his obligation to provide corroborative evidence and therefore failed to meet his burden of proof.<sup>115</sup>

This conclusion was based on the court's grammatical deconstruction of the statutory language. Corroborating evidence is necessary when the immigration judge determines so, and it is at that point that the statute's "should provide" language is implicated. But the court observed that "[t]he applicant cannot act on the [immigration judge's] determination that he 'should provide' corroboration . . . if he is not given notice of that determination until it is too late to do so."<sup>116</sup> This conclusion was, according to the court, buttressed by the "must provide" language that follows in the statutory scheme; that "language focuses on conduct that *follows* the [immigration judge's] determination," and "the statute's future directed language means that the applicant must be informed of the corroboration that is required."<sup>117</sup> Finally, the immigration judge may excuse the applicant for failure to submit corroborating evidence where the applicant "*does not have* the evidence and *cannot reasonably obtain it*."<sup>118</sup> Taking all these points together, the court held that the statute was clear that "if the [immigration judge] decides that the applicant *should* provide corroboration, the applicant must then have an opportunity to provide it, or to explain that he does not have it and 'cannot reasonably obtain it.'"<sup>119</sup>

Although the Ninth Circuit resolved the issue at *Chevron* step-one, finding that its reading of the statute was compelled by the plain text, it concluded that due process considerations would have mandated the same interpretation under the canon of constitutional avoidance.<sup>120</sup> The court noted that its Fifth Amendment jurisprudence survived the REAL ID Act, and that precedent "requires a 'full and fair hearing' in deportation proceedings."<sup>121</sup> Any other interpretation of the statute would, according to the court, violate the applicant's right to due process: "demand[ing] [corroboration] immediately on the day of the hearing" would "raise[] serious due process concerns by depriving [an applicant] of his guarantee of a reasonable opportunity to present evidence on his behalf."<sup>122</sup> "A requirement that something be provided even *before* notice is given would raise even more due process concerns."<sup>123</sup>

*Ren* was just the first step in the Ninth Circuit's interpretation of Section 1158(b)(1)(B)(ii). The court has since extended the framework of *Ren* to cases where the applicant has *not* testified credibly, *i.e.*, to cases where the

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115. *Id.*

116. *Id.* at 1091.

117. *Id.*

118. *Id.*

119. *Id.* at 1091–92 (quoting REAL ID Act of 2005, 8 U.S.C. § 1158(b)(1)(B)(ii)).

120. *Id.* at 1092 ("[E]ven if the language had been ambiguous, the canon of constitutional avoidance requires us to come to the result discussed above.")

121. *Id.* (quoting *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999)).

122. *Id.* at 1092 (quoting *Marcos v. Gonzales*, 410 F.3d 1112, 1118 n.6 (9th Cir. 2005)).

123. *Id.* at 1092–93.

statutory provision at issue in *Ren* is not implicated.<sup>124</sup> The rationale in later cases seems to be that if a credibility determination is overturned by the court of appeals, the applicant is then entitled to be treated as “otherwise credible,” and then becomes post-hoc “entitled to notice that he needs to provide corroborative evidence and an opportunity to either produce the evidence or explain why it is unavailable.”<sup>125</sup> In other words, the Ninth Circuit applies *Ren* not based on how the agency itself has applied the corroboration provision, but based on its ultimate review of the decision and, essentially, *de novo*.

The Ninth Circuit further expanded this rationale in *Bhattarai v. Lynch*.<sup>126</sup> It noted the ostensible statutory limitation from *Ren*, that “[t]he notice-and-opportunity requirement applies” only “when the applicant’s testimony is ‘otherwise credible.’”<sup>127</sup> Where no adverse credibility determination is entered, application of that standard is straightforward, but applying Section 1158(b)(1)(B)(ii) becomes more complicated where the lack of corroboration is intertwined with an adverse credibility determination. Applying *Ren* in that situation requires “disentangl[ing] the [immigration judge’s] corroboration-related reasons for the adverse credibility determination from other reasons, such as inconsistencies, implausibility, or demeanor.”<sup>128</sup> This in essence requires a two-step analysis: first, the court “separate[s] out the non-corroboration grounds for the adverse credibility determination and evaluate[s]” whether that determination is supported by substantial evidence; second, if those grounds do *not* support the credibility determination, the alien is deemed presumptively “credible” before the agency, and thus entitled, retroactively, to the benefits of the notice-and-opportunity rule.<sup>129</sup> At that stage, the court can assess compliance with *Ren*, even where the agency had no occasion itself to consider applying that framework.

In contrast with the Ninth Circuit, both the Seventh and Sixth Circuits have concluded that the statute does not require advance notice of specific corroborating evidence the immigration judge deems necessary or an automatic continuance to allow an alien to obtain and proffer that information.<sup>130</sup> In *Rapheal v. Mukasey*, the Seventh Circuit reviewed its pre-REAL ID Act corroboration precedents holding that the agency must conduct a three-step inquiry if relief is denied to an otherwise credible applicant based on the lack of corroboration.<sup>131</sup> The court concluded that the REAL ID Act “changed the landscape for [the court’s] review of this type of claim.”<sup>132</sup>

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124. See *Ai Jun Zhi v. Holder*, 751 F.3d 1088, 1094–95 (9th Cir. 2014).

125. *Lai v. Holder*, 773 F.3d 966, 976 (9th Cir. 2014).

126. *Bhattarai v. Lynch*, 835 F.3d 1037 (9th Cir. 2016).

127. *Id.* at 1043 (quoting *Ren v. Holder*, 648 F.3d 1079, 1090–92 (9th Cir. 2011)).

128. *Id.* at 1043.

129. *Id.* at 1043–44.

130. See *Gaye v. Lynch*, 788 F.3d 519 (6th Cir. 2015); *Darinchuluun v. Lynch*, 804 F.3d 1208 (7th Cir. 2015); *Abraham v. Holder*, 647 F.3d 626 (7th Cir. 2011); *Rapheal v. Mukasey*, 533 F.3d 521 (7th Cir. 2008).

131. *Rapheal*, 533 F.3d at 526 (citing *Gontcharova v. Ashcroft*, 384 F.3d 873, 877 (7th Cir. 2004)).

132. *Eke v. Mukasey*, 512 F.3d 372, 381 (7th Cir. 2008).

First, corroboration is *required* under the REAL ID Act, so long as it is not unavailable.<sup>133</sup> Second, “[c]orroborating evidence may be required even if the applicant is credible.”<sup>134</sup> Accordingly, the court concluded that “the *Gontcharova* three-part test, established for purposes of assessing the validity of the INS’s debatable interpretation of the corroboration rule, no longer controls.”<sup>135</sup>

The question in *Rapheal* ultimately arose in the context of a credibility determination, however, not a case where the alien was otherwise credible and the only issue was whether additional corroboration was necessary for her to carry her burden of proof.<sup>136</sup> But even in that latter context, the court rejected the notion that the applicant is entitled to a warning or advance notice of the need for corroborating evidence. The Act itself “clearly states that corroborating evidence may be required, placing immigrants on notice of the consequences for failing to provide corroborative evidence.”<sup>137</sup> Any contrary conclusion would complicate the efficient operation of removal proceedings, requiring a hearing to first “decide whether such corroborating evidence is required and then another hearing after a recess to allow the alien more time to collect such evidence.”<sup>138</sup>

The Seventh Circuit affirmed *Rapheal* in similar circumstances in *Abraham v. Holder*, a case where the applicant was found not credible and corroborative evidence was required to “rehabilitate” or rectify the credibility gap.<sup>139</sup> Reviewing its decision in *Rapheal*, the court concluded that contrary to the applicant’s arguments, “there is . . . no need for additional notice” from the adjudicator prior to finding that an alien has not carried their burden for failure to proffer reasonably available corroborating evidence.<sup>140</sup> Furthermore, in *Darinchuluun v. Lynch*, the court carried these holdings over into the statutory context of a Section 1158(b)(1)(B)(ii) case—where the applicant had testified credibly and the issue was further corroborative evidence needed to carry his burden of proof. There, the petitioner argued that the agency is “required to give notice of any inconsistency or shortcoming in the applicant’s testimony and provide the applicant with an opportunity to explain the inconsistency or supplement the record.”<sup>141</sup> The court found this argument foreclosed by *Rapheal* and *Abraham*, and the reasoning of those cases remained compelling; sufficient notice was already embodied in the statute and it would be onerous to require

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133. *Rapheal*, 533 F.3d at 527; see *Krishnapillai v. Holder*, 563 F.3d 606, 618 (7th Cir. 2009) (“Only if such evidence is beyond the reasonable ability of the immigrant to obtain is the judge precluded from demanding corroboration.”).

134. *Rapheal*, 533 F.3d at 527.

135. *Id.*

136. *See id.* at 528.

137. *Id.* at 530.

138. *Id.*

139. *Abraham v. Holder*, 647 F.3d 626, 629–31, 633 (7th Cir. 2011).

140. *Id.* (citing *Rapheal*, 533 F.3d at 530).

141. *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015).

multiple hearings to provide additional notice and an opportunity to obtain and proffer evidence.<sup>142</sup>

The Sixth Circuit also rejected the Ninth Circuit’s approach, albeit it in more conclusory fashion and based more on the plain language of the statute. In *Gaye v. Lynch*, that court held that the text of Section 1158(b)(1)(B)(ii)

[D]oes not suggest that the alien is entitled to notice from the [immigration judge] as to what evidence the alien must present. Even if it could be said that the statute is silent on the issue, and thus possibly could allow for such a construction (and we conclude it does not), it is plainly erroneous to say that the statute *unambiguously* mandates such notice.<sup>143</sup>

#### B. In re L-A-C-: Ambiguity and a Pragmatic Approach to Corroboration

With the courts of appeals divided 2 – 1, the Board waded into the debate in 2015 with its decision in *In re L-A-C-*, framing the issue as “whether an Immigration Judge is required to identify the specific corroborating evidence necessary to meet an applicant’s burden to establish a claim for asylum . . . and to provide an automatic continuance for the applicant to obtain the evidence for presentation at a future hearing.”<sup>144</sup> Starting with the statutory text, the Board observed that Section 1158(b)(1)(B)(ii) clearly allows an adjudicator to require corroborating evidence, even from an applicant who has otherwise testified credibly.<sup>145</sup> However, the statute did not squarely address the question presented: the statute “is ambiguous with regard to what steps must be taken when the applicant has not provided such evidence.”<sup>146</sup>

Since the language alone was insufficient to resolve the interpretive question, the Board turned to legislative history and statutory context “for guidance.”<sup>147</sup> The relevant legislative history made clear that Congress intended to codify the Board’s pre-REAL ID Act framework for corroborating evidence as stated in *In re S-M-J*.<sup>148</sup> That framework had provided that “regardless of whether an applicant is deemed credible, he has the burden to corroborate the material elements of the claim where the evidence is reasonably available, without advance notice from the Immigration Judge.”<sup>149</sup> Nowhere in the *In re S-M-J*-framework had the Board required immigration judges “to identify the specific corroborating evidence . . . that would be considered persuasive under the facts of the case to meet the applicant’s burden

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142. *Id.* (citations omitted).

143. *Gaye v. Lynch*, 788 F.3d 519, 530 (6th Cir. 2015).

144. *In re L-A-C-*, 26 I. & N. Dec. 516, 517 (BIA 2015).

145. *Id.* at 518.

146. *Id.*

147. *Id.*

148. *Id.* at 518–19.

149. *Id.* at 519.

of proof.”<sup>150</sup> Nor had that framework “require[d] the Immigration Judge to grant an automatic continuance for the applicant to present that corroborating evidence at yet another future merits hearing.”<sup>151</sup> Not only was there “*nothing* in the legislative history to suggest that Congress intended to impose such requirements,”<sup>152</sup> the imposition of such requirements would be contrary to the intent of the asylum amendments made by the REAL ID Act. The purpose of the package of amendments Congress made “was to allow Immigration Judges to follow commonsense standards in assessing asylum claims without undue restrictions. The intent was *not* to create additional procedural requirements relating to the submission and evaluation of corroborating evidence.”<sup>153</sup>

Procedurally, “[r]equiring advance notice of the need for specific corroborating evidence and an automatic continuance would be inconsistent with the normal procedures for conducting immigration court proceedings, which are separated into master calendar and merits hearings.”<sup>154</sup> At the master calendar, preliminary issues are resolved: “pleadings are taken, legal and factual issues in dispute are identified and narrowed, and continuances may be granted for good cause, such as to secure counsel or obtain evidence in preparation for the hearing on the merits of any application for relief from removal.”<sup>155</sup> At that hearing “the parties are [also] given advisals and warnings, including deadlines for submitting evidence, and the hearing on the merits is scheduled.”<sup>156</sup> At the merits hearing, on the other hand, the actual claim is presented and adjudged by the immigration judge: “witness testimony and other evidence is presented, the Immigration Judge makes factual findings and legal conclusions, and any applications for relief are resolved.”<sup>157</sup> An immigration judge may also resolve issues related to corroborating evidence at the merits hearing, but the scope of those issues is narrow. The immigration judge should determine the necessity of submitting such evidence, and should also provide an opportunity to the applicant, if no such evidence has been submitted, to “explain why he could not reasonably obtain such evidence.”<sup>158</sup> This explanation should be included on the record, as should the immigration judge’s determination as to whether the explanation was or was not sufficient, and why.<sup>159</sup> Finally, it is within the sound discretion of the immigration judge to consider whether a continuance *should* be granted, if requested, to obtain additional corroborating evidence.<sup>160</sup> Although an automatic continuance is

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150. *Id.* at 520.

151. *Id.*

152. *Id.* (emphasis added).

153. *Id.* (emphasis added) (internal citations omitted).

154. *Id.* at 520–21.

155. *Id.* at 521.

156. *Id.*

157. *Id.*

158. *Id.* at 521 (citing *Chukwu v. U.S. Att’y Gen.*, 484 F.3d 185, 192–93 (3d Cir. 2007)).

159. *Id.* at 521–22.

160. *Id.* at 522 (citing *In re Perez-Andrade*, 19 I&N Dec. 433 (BIA 1987); *In re Sibrun*, 18 I&N Dec. 354, 355–57 (BIA 1983); *see also* 8 C.F.R. §§ 1003.29, 1240.6 (2014)).

not required, the Board cautioned that “[t]here are circumstances in which it is appropriate to continue the proceedings to another merits hearing for an applicant to present additional corroboration.”<sup>161</sup> For example a continuance may be appropriate “where the Immigration Judge determines that that applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof.”<sup>162</sup>

The Board also made clear that the absence of corroborative evidence was just one piece of the burden-of-proof calculus. The immigration judge has an obligation to “weigh all of the evidence provided and consider the totality of the circumstances in determining whether the applicant has met his burden.”<sup>163</sup> And in deciding whether that burden has been met, the immigration judge “must not place undue weight on the absence of a particular piece of corroborating evidence while overlooking other evidence in the record that corroborates the claim.”<sup>164</sup> In concluding, the Board succinctly stated its holding and the structure of the corroboration framework under Section 1158 (b)(1)(B)(ii): the statute

[D]oes not impose a requirement that the Immigration Judge give an applicant advance notice of the specific corroborating evidence necessary to establish the applicant’s claim based on the facts of the case. And it does not require that the Immigration Judge provide the applicant an automatic continuance to obtain such corroboration.<sup>165</sup>

### C. *To Defer, or not to Defer?* In re L-A-C- in the Courts of Appeals

Following the decision in *In re L-A-C-*, four additional courts of appeals have weighed in on the corroboration provision, splitting 3 – 1 in favor of the Board’s interpretation. The Second, Fifth, and Eighth Circuits have concluded that no advance notice or opportunity to obtain corroborating evidence is required,<sup>166</sup> while the Third Circuit has rejected that interpretation, albeit based on an incorrect understanding of the Board’s holding.<sup>167</sup>

Of those courts that deferred to the Board’s approach, the Second Circuit provided the most comprehensive analysis of *In re L-A-C-*. Beginning with the plain language of the statute, the Second Circuit agreed with the Board’s

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161. *Id.* at 522.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 527.

166. *See* Avelar-Oliva v. Barr, 954 F.3d 757, 771 (5th Cir. 2020) (joining the Second, Sixth, Seventh, and Eighth Circuits “in rejecting the notion that an IJ, prior to disposing of an alien’s claim, must provide additional *advance* notice of the specific corroborating evidence necessary to meet the applicant’s burden of proof and an *automatic* continuance for the applicant to obtain such evidence”); Uzodinma v. Barr, 951 F.3d 960, 966–67 (8th Cir. 2020); Wei Sun v. Sessions, 883 F.3d 23, 30–31 (2d Cir. 2018).

167. *See* Saravia v. U.S. Att’y Gen., 905 F.3d 729 (3d Cir. 2018).

observation that “[t]he statutory language makes clear that corroborating evidence should be provided under certain circumstances if it is reasonably available. The language is silent, however, as to the procedure to be followed where corroborating evidence is needed.”<sup>168</sup> The statute neither mandates a specific advisal regarding the need to submit reasonably available corroborative evidence nor “does it provide that the trier of fact must allow a continuance to permit the gathering of . . . evidence.”<sup>169</sup> Addressing the Ninth Circuit’s decision in *Ren*, the Second Circuit concluded that the Ninth Circuit’s interpretation of the statutory language was *plausible*, but not unambiguously dictated by the language. First, and perhaps most importantly, none of the requirements the Ninth Circuit read into the statutory language actually appear in the statute. The mechanics of the Ninth Circuit’s “notice” and “opportunity” rule are not found in the text of the statute,<sup>170</sup> and there is no textual indication that a continuance to obtain and proffer evidence is required.<sup>171</sup> Nor did the Second Circuit believe that constitutional concerns dictated the Ninth Circuit’s interpretation. The application instructions direct the applicant to provide corroborating evidence as to general country conditions and the specific facts on which the applicant is relying, mirroring the statute.<sup>172</sup> Given the notice already embedded in the application and statute, due process did not require more. Accordingly, the Second Circuit “conclude[d] that the statute is ambiguous as to the procedure an [immigration judge] must follow when an applicant fails to provide corroborating evidence.”<sup>173</sup>

As to reasonableness, the Second Circuit concluded that *In re L-A-C-* was consistent with its own pre-REAL ID Act precedent and was a reasonable approach to the need for corroborating evidence. The court’s pre-REAL ID Act cases permitted reliance on a failure to corroborate in circumstances where the immigration judge “point[s] to specific pieces of missing evidence and show[s] that it was reasonably available,” while “giv[ing] the applicant an opportunity to explain the omission . . .” and “assess[ing] any explanation given.”<sup>174</sup> The court’s precedent *did* impose a requirement on the immigration judge to “specify the points of testimony that require corroboration,” but the court had never “held that this must be done *prior* to the [immigration judge’s] disposition of the alien’s claim.”<sup>175</sup> This rule remained reasonable

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168. *Wei Sun*, 883 F.3d at 29.

169. *Id.* at 29–30.

170. *Id.* at 30 (writing that the Ninth Circuit “reads into the statute the requirements of ‘notice’ and an ‘opportunity’ to produce or explain the absence of corroborative evidence ‘before’ a ruling is made. But these words simply do not appear in the statute.”).

171. *Id.*

172. *Id.* (citing *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008)); *In re L-A-C-*, 26 I. & N. Dec. 516, 520 (BIA 2015); see *Avelar-Oliva*, 954 F.3d at 769–70; *Uzodinma*, 951 F.3d at 966 (“The asylum application form and related statutes provide sufficient notice that corroborative evidence may be required and the consequences for failing to provide it.”).

173. *Wei Sun*, 883 F.3d at 30.

174. *Id.* at 31 (internal quotation marks omitted) (quoting *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009)).

175. *Id.* (internal quotation marks omitted) (quoting *Liu*, 575 F.3d at 198).

after the REAL ID Act, not only in light of the court's prior precedent, but in light of the realities of immigration proceedings. First, the sufficiency of the evidence cannot be gauged until the close of proceedings, so allowing a tentative determination regarding whether the applicant carried her burden of proof made little sense. It was at the close of the proceeding that the assessment of the totality of the evidence took place, and it was at that point where it made the most sense for the immigration judge to render his determination on the issue of corroborating evidence. Second, and a corollary to the first point, "the alien bears the ultimate burden of introducing . . . evidence," and this burden should be discharged "without prompting from the [immigration judge]." <sup>176</sup> If the applicant has not provided sufficient evidence to carry that burden at the close of proceedings, then that failure must inure to the detriment of the applicant. Especially in light of the allocation of the burden of proof and the general rule that an applicant has the burden to establish the specifics of her claim, "it is reasonable not to require that applicants receive a second opportunity to present their case after the [immigration judge] identify[s] the specific evidence they need to prevail." <sup>177</sup>

The Third Circuit broke rank with these courts in *Saravia v. Attorney General*, albeit for an idiosyncratic reason that does not fully track the Ninth Circuit's reasoning. The *Saravia* court began from common ground, reviewing the REAL ID Act's corroboration and burden-of-proof provisions. <sup>178</sup> But it also considered the judicial review provision governing the court of appeals' consideration of corroboration determinations on petition for review: "[n]o court shall reverse a determination made by a trier of fact with respect to the availability of corroborative evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable." <sup>179</sup>

With the statutory context set, the court then turned to its pre-REAL ID Act decision in *Abdulai v. Ashcroft*, which, like the Second Circuit's, had been *consistent* with the Board's framework in *In re S-M-J-*. The rule from *Abdulai* stated that a failure to corroborate would be upheld on appeal where the immigration judge had identified "the facts for which 'it is reasonable to expect corroboration,'" made "an inquiry as to whether the applicant has provided information corroborating the relevant facts, and if he or she has not, [analyzed] whether the applicant has adequately explained his or her failure to do so." <sup>180</sup> The court also noted additional gloss on the *Abdulai* framework that had, to some level, imposed an obligation of notice on the immigration judge prior to assessing the availability of corroborating evidence—some indication from the immigration judge to the applicant that specific evidence

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176. *Liu*, 575 F.3d at 198.

177. *Wei Sun*, 883 F.3d at 31.

178. *See Saravia v. U.S. Att'y Gen.*, 905 F.3d 729, 735–36 (3d Cir. 2018).

179. *Id.* at 736 (quoting 8 U.S.C. § 1252(b)(4)).

180. *Id.* at 736 (quoting *Abdulai v. Ashcroft*, 239 F.3d 542, 554 (3d Cir. 2001)).

was necessary under the facts of the case.<sup>181</sup> Despite the REAL ID Act's amendments, the court concluded that this framework survived into the new statutory context.

From *Abdulai* the Third Circuit proceeded to review *In re L-A-C-*, beginning with a mischaracterization of what that decision held: "in *In re L-A-C-*, the Board held that [Section 1158(b)(1)(B)(ii)] requires neither notice nor an opportunity to corroborate *or explain the failure to corroborate*."<sup>182</sup> So characterized, the court held that *In re L-A-C-* was not reasonable.<sup>183</sup> Whether under the corroboration provision, or the judicial review provision, the court opined that "we cannot conclude on review that it was fair to require Saravia to provide further corroboration without telling him so and giving him the opportunity either to supply that evidence or to explain why it was not available. Under any other rule, our review is not meaningful."<sup>184</sup> Temporally, this notice must occur prior to the adjudication of the application.<sup>185</sup> From this, the court jumped to its holding: "under the law in this Circuit, the Immigration Judge was obligated to provide Saravia with notice and an opportunity to corroborate his claim."<sup>186</sup> The court concluded by noting that although its rule, as announced, aligned with the Ninth Circuit's decision in *Ren*, the derivation of that rule differed. In the Third Circuit's view, its "rule derives principally from the fact that we cannot have meaningful judicial review without giving the applicant notice and an opportunity to corroborate."<sup>187</sup>

#### D. *Assessing the Conflict*

Seven courts of appeals have now weighed-in on the question of how the agency must conduct its corroboration analysis under Section 1158(b)(1)(B)(ii). Those courts have split 5–2 in favor of the Board's interpretation—that neither advance notice of the specific corroboration required for the applicant to carry his burden of proof nor an opportunity to obtain and proffer additional evidence is necessary. On some level, then, there is a clear conflict on the legal question resolved by the Board in *In re L-A-C-*. On a practical level, however, the conflict may be less consequential than it seems.

The Ninth Circuit's decision is incompatible with the decisions issued by the Second, Fifth, Sixth, Seventh, and Eighth Circuits, to the extent that it requires advance notice and an opportunity to obtain corroborating evidence prior to denying an application for failure to carry the burden of proof. That conflict is inherent in the differing statutory interpretations offered by these

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181. See *Chukwu v. U.S. Att'y Gen.*, 484 F.3d 185, 192 (3d Cir. 2007) (citing *Toure v. U.S. Att'y Gen.*, 443 F.3d 310, 323 (3d Cir. 2006)); *Mulanga v. Ashcroft*, 349 F.3d 123, 126 (3d Cir. 2003).

182. *Saravia*, 905 F.3d at 737 (emphasis added).

183. *Id.*

184. *Id.*

185. See *id.* at 737–38.

186. *Id.* at 738.

187. *Id.*

courts, as well as the deference at least some have extended to the Board's decision in *In re L-A-C-*. But practically, what is the effect of this conflict? Perhaps less than is apparent, given subsequent developments in the Ninth Circuit. The main conflict stems from what may need to occur at the merits hearing once additional evidence is required. Nevertheless, there is no reason to believe that the *Ren* requirements could not be satisfied *earlier* at the master calendar hearing, and thus align with how the Board viewed the proceedings as unfolding in *In re L-A-C-*. In *Jie Shi Liu v. Sessions*, for instance, the immigration judge "observed" at the master calendar hearing "that [the] application for asylum was supported only by [the applicant's] own statement. The [immigration judge], addressing [] counsel, said '[y]ou're going to have to supplement this, aren't you? . . . [C]ounsel explained that he had told [the applicant] that he would need to come up with some . . . other evidence.'"<sup>188</sup> The court held that this advisal complied with *Ren*: "[w]here . . . an [immigration judge] gives notice that an asylum-seeker's testimony will not be sufficient and gives the petitioner adequate time to gather corroborating evidence, and the petitioner then provides no meaningful corroboration or an explanation for its absence, the [immigration judge] may deny the application for asylum."<sup>189</sup>

The *Ren* requirements may seemingly be met, then, with more general advisals provided to the applicant at the master calendar hearing or at any other point prior to the merits hearing. An explicit advisal from the immigration judge only supplements the notice provided through the application and statute, but to the extent it constitutes compliance with *Ren*, there may be easy procedural mechanisms available to the agency to lessen the chances of *Ren*-based reversals in the Ninth Circuit. The question of what specificity may be required in these advisals remains open,<sup>190</sup> but could be answered through subsequent litigation honing how the *Ren* requirements may be applied or met at a master calendar hearing. If *Ren* compliance can be achieved at the master calendar hearing, the only question at the merits hearing is whether the evidence was unavailable or not, and whether the explanation provided by the applicant on this question is sufficient. In other words, the merits question in the Ninth Circuit is the same as the fundamental question that other courts of appeals must address at that point.

How the Third Circuit's decision in *Saravia* fits into any conflict is potentially more complicated. First, the decision may be limited in the same way *Ren* seems to have been limited by *Liu*; appropriate advisals may be provided at the master calendar hearing, which then provide the requisite opportunity to obtain corroborating evidence, with a final decision following at the merits hearing.

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188. *Jie Shi Liu v. Sessions*, 891 F.3d 834, 839 (9th Cir. 2018).

189. *Id.*

190. *Id.* ("We must also determine whether the notice provided to Liu by the IJ was specific enough to satisfy the requirements identified by *Ren*.").

Second, to the extent the Third Circuit focused on reviewability, the Board's decision in *In re L-A-C-* already requires the immigration judge to question the applicant about the availability of corroborative evidence and ensure that explanation is included in the record.<sup>191</sup> In other words, the Board's precedent, when properly characterized and applied, already meets the concerns of reviewability noted by the court. The reviewability "concern" is a creation of the court's own misunderstanding of *In re L-A-C-*'s holding. Given that, the court's requirement that the agency do what Board precedent already requires places the Third Circuit's decision in *Saravia* in line with the other courts of appeals that have adopted the Board's framework.

Third, and more confusing, is the question regarding what amount of *opportunity* to obtain and proffer corroborating evidence is required under Third Circuit law. In *Saravia*, the court reaffirmed the *Abdulai* framework, and *Abdulai* did not have a notice and opportunity requirement akin to *Ren*. *Abdulai* also effectively deferred to *In re S-M-J-*, while *In re L-A-C-* adopted the *S-M-J-* framework as the proper approach under Section 1158(b)(1)(B) (ii); none of those decisions require notice and opportunity. *Saravia* itself is unclear on what exactly it intends to require of the immigration judge—must the immigration judge only question the applicant regarding the availability of corroborating evidence and record that explanation, as the court hints, or must the immigration judge also provide the applicant an opportunity to obtain additional evidence once its need has been determined, as elsewhere the court seems to opine?<sup>192</sup>

The precedential Third Circuit cases upon which the court relied in concluding that there is (possibly) an opportunity-to-provide requirement are ambiguous at best. Those decisions either rely on a failure to apply the *Abdulai* framework without placing emphasis on the notice and opportunity issue,<sup>193</sup> or fault the agency for not providing such notice and opportunity in circumstances where the evidence sought by the immigration judge was not foreseeable in light of the totality of the circumstances, *i.e.*, in circumstances where the Board would have allowed a continuance under the law of *In re L-A-C-*.<sup>194</sup> Finally, to the extent the court declined to base its interpretation

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191. See *In re L-A-C-*, 26 I. & N. Dec. 516, 521 (BIA 2015).

192. Compare *Saravia v. U.S. Att'y Gen.*, 905 F.3d 729, 737 (3d Cir. 2018) ("[W]e cannot conclude on review that it was fair to require *Saravia* to provide further corroboration without telling him so and giving him the opportunity *either* to supply that evidence *or* to explain why it was not available.") (emphasis added), with *id.* at 738 ("While our result aligns with *Ren*, our rule derives principally from the fact that we cannot have meaningful judicial review without giving the applicant notice and an opportunity to corroborate.").

193. See *Chukwu v. U.S. Att'y Gen.*, 484 F.3d 185, 191–93 (3d Cir. 2007) (reversing the corroboration finding where the agency failed to engage in the inquiry required by *Abdulai*); *Toure v. U.S. Att'y Gen.*, 443 F.3d 310, 323–24 (3d Cir. 2006) (similar).

194. See *Mulanga v. Ashcroft*, 349 F.3d 123, 133–37 (3d Cir. 2003) (rejecting corroboration finding where the immigration judge requested specific pieces of corroborating evidence, but then faulted the applicant for failure to provide *other* evidence that had never been requested).

in the language of Section 1158(b)(1)(B)(ii), it is unclear where any notice and opportunity requirement might otherwise originate. Notice and an opportunity to *produce* evidence is clearly irrelevant to the reviewability question, on which the court seemed to rely, since the court's review is safeguarded so long as the applicant is questioned about the availability of evidence, with his responses included in the record of proceedings. The court's ability to review this question under the appropriate standard of review has nothing to do with whether the applicant has been provided an opportunity to obtain additional evidence.

Time will be telling for all these questions. The courts in both the Third and Ninth Circuits will have to grapple with these issues as they are raised in specific cases going forward. The ostensible conflict may be mitigated by future decisions, refining and perhaps narrowing application of the notice and opportunity requirements. In the alternative, it may turn out that the conflict is, in fact, as consequential as it appears.

#### IV. ASSESSING *IN RE L-A-C* UNDER *CHEVRON*

What is the better interpretation of the statute? Does Section 1158(b)(1)(B)(ii) unambiguously mandate the three-step process adopted by the Ninth Circuit in *Ren*? Does Section 1252(b)(4), the judicial review provision, unambiguously require advance notice of specific pieces of corroborating evidence, as contemplated by the Third Circuit in *Saravia*? Or if the statute is silent on the specific question presented in these cases, what steps must an immigration judge take after determining that additional corroboration is necessary for the applicant to carry her burden of proof, thus leaving to the agency to provide a reasonable interpretation of the language? This Part aims to resolve these questions. In subsection A, this article argues that there is no clear mandate for advance notice of specific pieces of corroborating evidence in either Section 1158(b)(1)(B)(ii) or Section 1252(b)(4), and that an interpretation creating such a requirement is *not* necessary for constitutional-avoidance reasons. Subsection B then contends that the interpretation by the Board is reasonable and permissible under *Chevron*. The Board's interpretation better balances the competing interests of a full and fair hearing with the agency's interests in efficiency and the general rule that a party bearing the burden of proof and persuasion should come to a hearing with evidence sufficient to carry that burden or suffer the adverse consequences of that failure.

##### A. *Plain Meaning or Ambiguous?*

Beginning with the statute itself, “[f]irst, always, is the question whether Congress has directly spoken to the *precise question at issue*. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of

Congress.”<sup>195</sup> Does the text of Section 1158(b)(1)(B)(ii) speak *directly* to the issue of whether an applicant is entitled to advance notice of specific pieces of corroborating evidence and an opportunity to obtain and proffer that evidence? The statute itself does not explicitly include any of these requirements in the form mandated by the Ninth Circuit in *Ren*, and although it allows the immigration judge to require corroborating evidence it does not include set procedures for the immigration judge once he determines that the existing evidence is insufficient to meet the applicant’s burden of proof. As the Second Circuit held in the course of deferring to *In re L-A-C*:

[The statutory] language is silent . . . as to the procedure to be followed where corroborating evidence is needed. It does not provide . . . that the trier of fact must advise the applicant that corroborating evidence is necessary before issuing a final decision nor does it provide that the trier of fact must allow a continuance to permit the gathering of corroborating evidence.<sup>196</sup>

On one level, then, the *Ren* requirements are extratextual, as they do not derive from any explicit mandate in the text itself. *Ren* relied on a grammatical analysis in the imposition of those requirements, however, concluding that those requirements were implicit in the structure of Section 1158(b)(1)(B)(ii).

First, circling back to the explicit-implicit distinction, the Supreme Court has cautioned that courts should generally “resist reading words or elements into a statute that do not appear on its face.”<sup>197</sup> As the Ninth Circuit itself has noted in other contexts, courts may not “impose ‘procedural requirements [not] *explicitly* enumerated in the pertinent statutes.’”<sup>198</sup> There is, thus, an argument that the failure to *explicitly* include procedural steps to be followed by the immigration judge should be the end of the matter, and the court has no license to proceed to a grammatical deconstruction of verb tenses in order to tease out a process where Congress has declined to plainly mandate that process.

Second, even if it may be permissible to look beyond the lack of specifically enumerated procedures, the Ninth Circuit’s reliance on verb tenses within the statute is less compelling than it may initially appear. The Ninth

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195. *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (emphasis added); *see Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (“Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.”); *see also Entergy Corp. v. Riverkeeper, Inc.*, 555 U.S. 208, 218 n.4 (2009) (“[I]f Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.”).

196. *Wei Sun v. Sessions*, 883 F.3d 23, 29–30 (2d Cir. 2018); *accord In re L-A-C*, 26 I. & N. Dec. at 518.

197. *Dean v. United States*, 556 U.S. 568, 572 (2009) (internal quotation marks omitted) (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)).

198. *Lands Council v. McNair*, 537 F.3d 981, 982 (9th Cir. 2008) (emphasis added) (quoting *Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 818 (9th Cir. 1990)).

Circuit's ultimate interpretation depends not on the verb tenses in isolation, but on choosing a primary reference point for when (and thus how) the requirements of Section 1158(b)(1)(B)(ii) may be triggered.

The Ninth Circuit effectively read into the statute that corroboration determinations will be made at the merits hearing itself, and having chosen that reference point imposed requirements flowing from that point in time—notice to the applicant *after* the immigration judge's determination and a subsequent opportunity to obtain and proffer (or explain the unavailability of) corroborating evidence.<sup>199</sup> But the statutory language itself does not mandate using the merits hearings as the reference point. The statute could easily, and more logically, refer to the point at which the applicant submits the application for asylum. If *that* reference point is used, the statute would place the applicant on notice that his testimony alone may be sufficient, so long as it “is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee.”<sup>200</sup> It would inform the applicant that in reaching his final determination, the immigration judge “may weigh the credible testimony along with other evidence of record.”<sup>201</sup> This would warn the applicant that in circumstances where the immigration judge concludes credible testimony alone is insufficient, the applicant will be required to submit corroborating evidence, or establish that such evidence is unavailable and cannot be reasonably obtained.<sup>202</sup>

Viewed from this proposed reference point, the notice is indeed forward looking—it looks from the completion and submission of the application to the merits hearing itself. It also provides the opportunity that the Ninth Circuit viewed as necessary—the opportunity between the initial review, completion of the application, and the merits hearing—to obtain evidence supporting the factual assertions contained in the application itself. Nothing forecloses using the submission of the application as the relevant temporal starting point for assessing what is required by Section 1158(b)(1)(B)(ii), and using that point, rather than the merits hearing, is more consistent with the language the application itself uses. The application language tells the applicant: submit “reasonably available corroborating evidence showing . . . the specific facts on which you are relying to support your claim.”<sup>203</sup> Contrary to the Ninth Circuit's decision in *Ren*, the “unambiguous” import of the statutory language only becomes apparent if one chooses an arbitrary temporal point by which to judge that language. However, the need to select a starting point leads toward ambiguity, because it is equally reasonable to assess the

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199. See *Ren v. Holder*, 648 F.3d 1079, 1090–92 (9th Cir. 2011); see also *Saravia v. U.S. Att’y Gen.*, 905 F.3d 729, 737–38 (3d Cir. 2018) (contemplating a sequential process based on the statutory language).

200. 8 U.S.C. § 1158(b)(1)(B)(ii).

201. *Id.*

202. See *id.*

203. See I-589, Application for Asylum and for Withholding of Removal, Instructions 8 (Sept. 10, 2019), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

statutory language from an entirely different temporal point. In other words, the Ninth Circuit's interpretation may well be "plausible,"<sup>204</sup> but it is not unambiguously required by the statute and is not the only possible reading of its language.

Other *Chevron* step-one considerations point away from the plain meaning the Ninth Circuit imposed on the statute, for instance, the statutory structure and the context of Section 1158(b)(1)(B)(ii).<sup>205</sup> The asylum statute, Section 1158, does not generally mandate specific procedures for the consideration of asylum applications. Rather, that section is composed almost entirely of explicit and implicit delegations. The statute provides for circumstances where an applicant may be *eligible* for asylum, but also gives to the Attorney General the ultimate discretion as to whether to *grant* that form of relief (or, if certain conditions are met, to terminate a previous grant of relief).<sup>206</sup> To the extent the statute limits the Attorney General's discretion in this area, it is negative, *i.e.*, it *forecloses* an exercise of discretion, either by disallowing an application from certain aliens in the first place or by deeming certain aliens categorically ineligible for asylum.<sup>207</sup> Even in those circumstances, however, Congress has delegated additional authority to the Attorney General, who "may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum . . . ."<sup>208</sup> The rules and procedures under which an application shall be completed, submitted, and considered are left almost entirely to the Attorney General, whom the statute empowers to establish those rules and procedures.<sup>209</sup>

Where Congress intended the agency to be governed by specific rules or procedures, it used language mandating those procedures, *i.e.*, eliminating any discretion over whether those rules and procedures apply, and explicitly and specifically detailing what those procedures should entail. For instance, Congress provided that certain privileges should flow from a grant of asylum, including employment authorization, and the government has no discretion

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204. *Wei Sun v. Sessions*, 883 F.3d 23, 30 (2d Cir. 2018).

205. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that courts must read the text of a statutory provision "in [its] context and with a view to [its] place in the overall statutory scheme."); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to . . . the language and design of the statute as a whole.").

206. *See* 8 U.S.C. § 1158(b)(1)(A) ("The . . . Attorney General *may* grant asylum to an alien . . . if the . . . Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.") (emphasis added); 8 U.S.C. § 1158(c)(2) (noting conditions under which the Attorney General *may* terminate a prior grant of asylum).

207. *See* 8 U.S.C. § 1158(a)(2)(A)–(C) (barring certain aliens from applying for asylum); 8 U.S.C. § 1158(b)(2)(A),(B) (rendering certain aliens statutorily ineligible for asylum).

208. 8 U.S.C. § 1158(B)(2)(C); *see* 8 U.S.C. § 1158(b)(2)(B)(ii) (giving the Attorney General authority to designate offenses as disqualifying "particularly serious crime[s]" or "serious nonpolitical crime[s]").

209. *See* 8 U.S.C. § 1158(b)(1)(A) (establishing that an alien must apply "for asylum in accordance with the requirements and procedures established by the [government] . . . ."); 8 U.S.C. § 1158(d)(1) ("The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a)."); 8 U.S.C. § 1158(d)(5)(B) ("The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this Act.").

not to extend those benefits.<sup>210</sup> Congress also directed that whatever other conditions and limitations the Attorney General may provide in establishing the procedures for applying for asylum, those procedures *shall* include certain features including: deadlines for interviews and consequences for failing to appear, deadlines for final adjudication of an application, filing deadlines for administrative appeals, and identity verification requirements.<sup>211</sup> The mandatory nature of these provisions is in contrast to other subsections of the same provisions. Although the alien *shall* be granted employment authorization if asylum is granted, in the same circumstances the Attorney General “*may* allow the alien to travel abroad with the prior consent of the Attorney General.”<sup>212</sup> And elsewhere in Section 1158(d), Congress noted *other* conditions and limitations that the Attorney General *may* impose, if he so desires.<sup>213</sup>

Given a statutory scheme that so completely entrusts the procedures for adjudication to the Attorney General, it makes little sense to read into the plain language of Section 1158(b)(1)(B)(ii) *implicit* requirements and limitations on the Attorney General’s discretion to conduct the corroboration inquiry. The rationale supporting implicit requirements is even more illogical where nothing in that provision mirrors the language Congress *did* use in the rare instances where it imposed procedures and rules on the consideration of asylum applications. There is no “shall” language imposing procedures in Section 1158(b)(1)(B)(ii), as Congress used in other provisions of Section 1158 directing specific procedures, and the only “mandatory” requirement in Section 1158(b)(1)(B)(ii) relates to the applicant’s obligation to provide corroborating evidence of her claim. The determination of whether such evidence is necessary is left to the discretion of the trier of fact, as are the determinations relating to whether the existing evidence is sufficient to meet the applicant’s burden of proof. Accordingly, the statutory structure and the specific context of Section 1158(b)(1)(B)(ii) point strongly away from the Ninth Circuit’s interpretation of the statute, and certainly away from a plain-meaning resolution in line with *Ren*.

Finally, legislative history not only fails to support the Ninth Circuit’s decision, it is contrary to the rule imposed by *Ren*.<sup>214</sup> Nothing in the legislative history so much as hints at the process imposed by *Ren*; there is no statement regarding advance notice to the applicant of the need for corroborating evidence and no indication that an opportunity to obtain and proffer that evidence is required. The clearly expressed intent of Congress was to adopt the

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210. See 8 U.S.C. § 1158(c)(1)(A)–(B).

211. 8 U.S.C. § 1158(d)(5)(A).

212. 8 U.S.C. § 1158(c)(1)(C).

213. 8 U.S.C. § 1158(d)(1)–(3).

214. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 586–90 (2004) (analyzing legislative history to reach an understanding of the plain text of the statute); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (same); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649–50 (1990) (same).

existing corroboration framework of *In re S-M-J*,<sup>215</sup> which did *not* require advance notice or an opportunity to submit evidence.<sup>216</sup> More fundamentally, Congress intended the REAL ID Act as a corrective to counter Ninth Circuit precedent that had overlaid the statute with extra-statutory requirements, conditions, and limitations.<sup>217</sup> Especially in light of that intent, it would be inconsistent to mandate a non-stated particularized set of rules for gauging corroboration, addressing burden-of-proof questions, and conducting evidentiary hearings.

Section 1158(b)(1)(B)(ii) does not *unambiguously* resolve the question presented. Its plain language does not point to any procedures or temporal process; the statutory structure and context undermine the assertion that Congress intended specific procedures to apply to that determination, and legislative history indicates an intent that runs directly counter to the interpretation adopted in *Ren*. What, then, of Section 1252(b)(4), the judicial review provision on which the Third Circuit placed its emphasis in rejecting *In re L-A-C*? That provision concerns only the judicial review of the agency's determination as to whether evidence was unavailable and does not discuss the mechanics of the corroboration determination itself. It is then unsurprising that Section 1252(b)(4) does not mention notice to the applicant of specific corroborating evidence or an opportunity to provide that evidence.

Section 1252(b)(4) can be read to impose a requirement on the immigration judge to (1) question the applicant regarding the availability of corroborating evidence, and (2) ensure that explanation is memorialized in the record of proceedings. It is the immigration judge's determination on this question—the availability of evidence—that is reviewed in the court of appeals under the compelling evidence standard, so making that determination is the *sine qua non* for applying this provision. Nonetheless, that determination, and the court's ability to review it, has nothing whatsoever to do with advance notice of specific pieces of corroborating evidence and an opportunity to obtain and submit that evidence. In any event, the Board's decision already adequately safeguards the court's judicial review function by requiring the immigration judge to make specific findings on the availability of corroborating evidence.<sup>218</sup> Section 1252(b)(4) thus provides no footing for the interpretations of the Third and Ninth Circuits.

If the statute does not itself mandate the interpretation adopted by the Third and Ninth Circuits, does the canon of constitutional avoidance require

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215. See Conf. Rept., *supra* note 90, at 165–66.

216. See *In re L-A-C*, 26 I. & N. Dec. 516, 519–20 (BIA 2015).

217. See Conf. Rept., *supra* note 90, at 161 (noting need for uniform standard on the burden-of-proof and requirement for corroboration), 162–65 (noting and rejecting the Ninth Circuit's aberrant precedent in “mixed-motive” cases), 167 (same, for the Ninth Circuit's aberrant precedent regarding credibility determinations).

218. See *In re L-A-C*, 26 I. & N. Dec. at 521–22 (“[T]he applicant should be given an opportunity to explain why he could not reasonably obtain such evidence” and the immigration judge “must . . . ensure that the applicant's explanation is included in the record and should clearly state for the record whether the explanation is sufficient.”).

such an interpretation? The Ninth Circuit in *Ren* opined that “‘demand[ing] corroboration immediately on the day of the hearing’ would ‘raise[] serious due process concerns by depriving [an applicant] of his guarantee of a reasonable opportunity to present evidence on his behalf.’”<sup>219</sup> And, the court continued, requiring that such evidence “be provided even *before* notice is given would raise even more due process concerns.”<sup>220</sup> The Third Circuit rested mostly on reviewability grounds in rejecting *In re L-A-C-*, but it, too, hinted at due process-like concerns.<sup>221</sup>

The starting point for this analysis is not controversial. There is no question that the Fifth Amendment applies to immigration proceedings, and thus, such proceedings must be “fundamentally fair.”<sup>222</sup> Due process means that the alien is entitled to a reasonable “opportunity to fairly present evidence, offer arguments, and develop the record.”<sup>223</sup> In other words, “due process requires, at a minimum, that the INS adopt procedures to ensure that asylum petitioners are accorded an opportunity to be heard at a meaningful time and in a meaningful manner, *i.e.*, that they receive a full and fair hearing on their claims.”<sup>224</sup>

Does due process *require* advance notice in every case and an opportunity to obtain corroborating evidence, consistent with the *Ren* requirements? This is not a question that can be answered in the abstract. As the Supreme Court has noted “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>225</sup> Determining what the “particular situation demands” involves a three part inquiry into: (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”<sup>226</sup>

This article will assume a sufficiently weighty private interest in an as close to objectively correct determination on asylum eligibility as one could

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219. *Ren v. Holder*, 648 F.3d 1079, 1092 (9th Cir. 2011) (quoting *Marcos v. Gonzales*, 410 F.3d 1112, 1118 n.6 (9th Cir. 2005)).

220. *Id.* at 1092–93.

221. *See Saravia v. U.S. Att’y Gen.*, 905 F.3d 729, 737 (3d Cir. 2018) (“[W]e cannot conclude on review that it was *fair* to require Saravia to provide further corroboration without telling him so and giving him the opportunity either to supply that evidence or to explain why it was not available.”) (emphasis added).

222. *See Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir. 2004) (“The Fifth Amendment’s due process clause mandates that removal hearings be fundamentally fair.”); *see also Cinapian v. Holder*, 567 F.3d 1067, 1074 (9th Cir. 2009) (“The right to a fair hearing derives from the Due Process Clause of the Fifth Amendment, which applies in removal proceedings.”) (citation omitted); *accord Huicochea-Gomez v. INS*, 237 F.3d 696, 699 (6th Cir. 2001).

223. *Tun v. Gonzales*, 485 F.3d 1014, 1025 (8th Cir. 2007).

224. *Aslam v. Mukasey*, 537 F.3d 110, 114 (2d Cir. 2008) (quoting *Rusu v. INS*, 296 F.3d 316, 321–22 (4th Cir. 2002)).

225. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

226. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

hope for. Asylum is discretionary, which could complicate the assessment of the sufficiency of the procedures used.<sup>227</sup> However, such relief involves allegations of potentially severe harm if removed. In any event, the proper analysis under *Mathews* does not meaningfully depend on the weight of the private interest, because consideration of the other two factors, risk of erroneous deprivation and the governmental interest at stake, points away from the need for additional notice and opportunity.

First, there is little risk of an *erroneous* deprivation without providing the notice and opportunity required by the Third and Ninth Circuits. Applicants for asylum have notice of the need for corroborating evidence based on long-standing Board precedent, both before and after the REAL ID Act. Additional notice appears in the statute itself, along with the application to be completed and submitted—both of which indicate the need to submit corroborating evidence.<sup>228</sup> In fact, the application is quite explicit on the need to provide corroboration of both general country conditions and the specific facts on which the applicant is relying.<sup>229</sup> Additionally, the applicant should receive some other notice or advisal from the immigration judge at the master calendar hearing.<sup>230</sup> If the applicant *still* fails to satisfy his or her burden of proof at the merits hearing, including through the failure to provide reasonably available corroborating evidence, that denial follows as a legal matter; it is not an “erroneous deprivation.” The applicant failed to prove their claim, and that should be the end of the matter. It is also unclear whether additional procedures would meaningfully add to this notice regime. The notice and opportunity afforded in *Ren* itself did not “change” the result, as the applicant there still failed to provide relevant evidence and carry his burden of proof.<sup>231</sup>

Second, the value of additional procedures does not outweigh the government’s interest in the efficient operation of removal proceedings. The cost of providing a preliminary assessment of whether the applicant has satisfied his

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227. See, e.g., *Ticoalu v. Gonzales*, 472 F.3d 8, 11 (1st Cir. 2006) (“Due process rights do not accrue to discretionary forms of relief, and asylum is a discretionary form of relief.”) (internal citations omitted); but see, e.g., *Calderon-Rosas v. Attorney General United States*, 957 F.3d 378, 384 (3d Cir. 2020) (“We long ago recognized that due process claims can be asserted by petitioners seeking discretionary relief because ‘Congress instructed the Attorney General to establish an asylum procedure,’ and ‘[w]hen Congress directs an agency to establish a procedure . . . it can be assumed that Congress intends that procedure to be a fair one.’” (quoting *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996))).

228. See I-589, Application for Asylum and for Withholding of Removal, Instructions 8 (Sept. 10, 2019), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>; see also *Uzodinma v. Barr*, 951 F.3d 960, 966 (8th Cir. 2020) (“The asylum application form and related statutes provide sufficient notice that corroborative evidence may be required and the consequences for failing to provide it.”); *Rapheal v. Mukasey*, 533 F.3d 521, 530 (7th Cir. 2008) (“[W]e add that the REAL ID Act clearly states that corroborating evidence may be required, placing immigrants on notice of the consequences for failing to provide corroborative evidence.”); accord *Wei Sun v. Sessions*, 883 F.3d 23, 30 (2d Cir. 2018).

229. I-589, Application for Asylum and for Withholding of Removal, Instructions 8 (Sept. 10, 2019), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

230. See *In re L-A-C-*, 26 I. & N. Dec. 516, 521 (BIA 2015) (noting what should occur at the master calendar hearing).

231. See *Ren v. Holder*, 648 F.3d 1079, 1083 (9th Cir. 2011) (noting that “Ren failed to provide the requested evidence . . .” despite the immigration judge providing notice and an opportunity to submit evidence).

or her burden and then continuing proceedings to gather more evidence to address any gaps may well entail some grants in cases that would have otherwise been denied— at a cost that is disproportionate to the benefit. Applicants should come to the merits hearing ready with all relevant evidence and prepared to rest at the conclusion of the proceeding. Failure to bring sufficient evidence to carry their burden of proof should inure to the applicant's detriment, not open the door to an automatic continuance (or continuances, since there may be no technical stopping point to the Ninth Circuit's rule). A contrary rule would mandate multiple possible merits hearings, where the immigration judge would be required to provide successive notices and opportunities to provide evidence that *should have already* been submitted, if reasonably available.<sup>232</sup> This result is especially unwarranted, given the multiple layers of notice already embodied in the statute, decisional law, and application instructions.

This analysis is consistent with the general approach taken in other litigation.<sup>233</sup> The Ninth Circuit observed, “[i]t is hard to imagine a civil trial in which the party bearing the burden of proof ask[s] the trier of fact to take his uncorroborated word for a proposition reasonably subject to corroboration.”<sup>234</sup> If a plaintiff in a personal injury case, for instance, “testifies that the collision caused \$10,000 worth of damage to his car, \$5,000 in medical expenses, and \$10,000 in wage loss, the jury is likely to reject and is free to reject his damages testimony unless it sees the body shop invoice, the medical bills, and documentary evidence of wage loss.”<sup>235</sup> In other words, the party with the burden of proof has the inherent responsibility to corroborate the material aspects of his or her claim without prompting, and can be found to have failed to carry that burden without advance notice and an opportunity to respond. There is no entitlement to a “preliminary” determination by the trier of fact regarding the sufficiency of the evidence, or a required continuance to allow the gathering of additional evidence to meet any evidentiary gaps; such a continuance is within the sound discretion of the trial judge.<sup>236</sup>

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232. See *Rapheal*, 533 F.3d at 530.

233. See *Aden v. Holder*, 589 F.3d 1040, 1045 (9th Cir. 2009) (noting that with the REAL ID Act, “Congress . . . made asylum litigation a little more like other litigation.”).

234. *Id.* at 1045 n.13.

235. *Id.* at 1045.

236. See, e.g., *United States v. Doe*, 572 F.3d 1162, 1172 (10th Cir. 2009) (“[T]he government’s case-in-chief should not be treated as an experiment that can be cured after the defendant has, by motion, identified the failures. But the trial court must be vested with discretion to permit reopening when mere inadvertence or some other compelling circumstance . . . justifies a reopening and no substantial prejudice will occur.”) (citation omitted); *United States v. Crawford*, 533 F.3d 133, 138 (2d Cir. 2008) (considerations to guide the trial judge’s reopening of a case including “the timeliness of the motion, the character of the testimony, and the effect of granting the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief. . . .”) (quotation marks and citation omitted); *United States v. Boone*, 437 F.3d 829, 836 (8th Cir. 2006) (“A trial court may permit either side to reopen its case in chief, and we have previously characterized the discretion it exercises in doing so as ‘wide.’”) (internal citations omitted); see also *United States v. Orozco*, 764 F.3d 997, 1001 (9th Cir. 2014) (“[W]e join our sister circuits in holding that a defendant must generally invoke the right to testify before the close of evidence and we consider the following factors [] to determine whether a district court

The fact that a trier of fact ordinarily renders a decision at the close of evidence, and that only discretionary reopening is available for submission of additional evidence to cure gaps or oversights in exceptional circumstances, belies the Ninth Circuit's claim that due process *requires* the *Ren* framework. Due process is met by allowing an applicant a reasonable opportunity to present her case in chief. Due process does not require a cascade of opportunities after the close of evidence to fill holes poked in that case by the trier of fact.

B. *The Board's Pragmatic Interpretation of Section 1158(b)(1)(B)(ii) is Reasonable*

The plain text of the statute does not mandate a set sequential process that the immigration judge must undertake before faulting an applicant for a failure to submit reasonably available corroborating evidence. The question then becomes whether the Board's interpretation of Section 1158(b)(1)(B)(ii) as not requiring advance notice and opportunity is a reasonable and permissible construction of that provision. In engaging in this inquiry, the Board's interpretation must "prevail[] if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best."<sup>237</sup> The Board's construction of the statute may be rejected only if it is "clearly contrary to the plain and sensible meaning of the statute,"<sup>238</sup> such that it is "not one that Congress would have sanctioned."<sup>239</sup>

The Board's interpretation of the statute is at the least not *contrary* to the "plain and sensible meaning" of Section 1158(b)(1)(B)(ii), and every indication is that it represents the *exact* interpretation that Congress meant to enact.<sup>240</sup> This is so for several reasons, many of which are relevant to both the ambiguity analysis and the reasonableness analysis.<sup>241</sup>

First, as was extensively noted in the preceding section, there is no statutory language that is clearly contrary to the Board's interpretation in *In re L-A-C-*. The agency interpretation does not run counter to any textual command, as the statute does not *explicitly* mandate notice and opportunity to

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abused its discretion in denying a motion to reopen to allow a defendant to testify: (1) the timeliness of the defendant's motion, (2) the character of the proposed testimony, (3) the disruptive effect of granting the motion, and (4) whether the defendant offered a reasonable excuse for his or her untimely request to testify.") (citing *United States v. Byrd*, 403 F.3d 1278, 1284, 1287 (11th Cir. 2005) (citing *United States v. Walker*, 772 F.2d 1172, 1177 (5th Cir. 1985)); *United States v. Peterson*, 233 F.3d 101, 106 (1st Cir. 2000)).

237. *Holder v. Martinez-Gutierrez*, 566 U.S. 583, 591 (2012); *Scialabba v. Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion) ("[A] court must defer to the Board's reasonable interpretation, rather than substitute its own reading.>").

238. *Mota v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008).

239. *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (citation omitted).

240. *Cf. Gaye v. Lynch*, 788 F.3d 519, 530 (6th Cir. 2015) (opining that the statute does not allow for an interpretation of the statute consistent with the Ninth Circuit's decision in *Ren*).

241. *See generally* Matthew C. Stephenson & Adrian Vermuele, *Chevron has Only One Step*, 95 VA. L. REV. 597, 604 (2009) (arguing that the fundamental inquiry under *Chevron's* stated two-step framework effectively collapses into an analysis of the reasonableness of the agency's interpretation).

provide corroborating evidence. It also does not run counter to any implicit command, as the weight placed on the verb-tenses used by Congress depends on the selection of an arbitrary temporal point from which to assess verb tense application. The Ninth Circuit’s decision to use the merits hearing as that temporal point may be reasonable and lead to a *plausible* interpretation of the statute, but it is not the only permissible interpretation.<sup>242</sup> And the Board’s interpretation is consistent with the “plain and sensible meaning” of the statutory language—that credible testimony *may* be sufficient, but that reasonably available corroborating evidence must be provided where deemed necessary, and that failure to provide such evidence can be held against the applicant unless he offers a compelling explanation for why that evidence was not, and could not, have been proffered.

Second, the Board’s interpretation is consistent with legislative intent. Congress consciously sought to enact the Board’s existing corroboration standards into law with the REAL ID Act. Congress noted the precedential decision it assumed would guide the agency in its consideration of burden-of-proof and corroboration claims, *In re S-M-J-*, and laid out in the Conference Report the framework it believed should govern.<sup>243</sup> That framework, as the Board subsequently noted in *In re L-A-C-*, did not require advance notice that corroborating evidence was required or an opportunity to submit additional evidence. It seems that if Congress intended such a dramatic departure from prior Board precedent, it would have noted so somewhere in the legislative history. Instead, Congress indicated its desire that the standards announced in *In re S-M-J-* would uniformly govern the agency and courts.<sup>244</sup> The Board’s interpretation in *In re L-A-C-* thus does *not* run afoul of any legislative intent; indeed,, it seems to be *exactly* what Congress intended in enacting Section 1158(b)(1)(B)(ii).

Third, declining to mandate another layer of notice, and further opportunity to obtain and submit evidence, is reasonable in light of all the existing points of notice within the system. When the applicant decides to apply for asylum, the application is explicit regarding her obligations to submit corroborating evidence, both as to general country conditions and the specific facts undergirding the claim.<sup>245</sup> The statutory framework under which that application will be judged also clarifies the importance of providing reasonably

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242. See *Wei Sun v. Sessions*, 883 F.3d 23, 29–30 (2d Cir. 2018) (concluding that the Ninth Circuit’s decision was plausible, but not unambiguously dictated by the statute); *Gaye*, 788 F.3d at 530 (“Even if it could be said that the statute is silent on the issue [of notice and opportunity], and thus possibly could allow for such a construction . . . , it is plainly erroneous to say that the statute *unambiguously* mandates such notice.”).

243. See Conf. Rept., *supra* note 90, at 165–66.

244. *Id.* at 161 (noting pre-REAL ID Act disagreement “on when credible testimony alone can meet the burden and when corroboration is needed.”); see *id.* at 166 (“Congress anticipates that the standards of *In re S-M-J-*, including the BIA’s conclusions on situations where corroborating evidence is or is not required, will guide the BIA and the courts in interpreting this clause.”).

245. See I-589, Application for Asylum and for Withholding of Removal, Instructions 8 (Sept. 10, 2019), <https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf>.

available corroborating evidence, as do agency and court of appeals' decisions extending back decades.<sup>246</sup> Finally, the immigration judge can advise the applicant regarding the burden-of-proof and the applicant's evidentiary obligations at the master calendar hearing.<sup>247</sup> At no less than four points during the asylum process the applicant will have notice that she must affirmatively establish her claim through credible testimony and reasonably available corroborating evidence. It is not unreasonable to decline to read a fifth point into the statute.

Fourth, the Board's pragmatic interpretation in *In re L-A-C-* better balances the need for efficient and flexible rules and an applicant's interest in a full and fair hearing, as opposed to the Ninth Circuit's stricter, inflexible framework. Given the many layers of notice already embedded in the asylum process, the Board reasonably held that in the normal course, a failure to submit evidence that is directly and foreseeably relevant to establishing the applicant's claim at the merits hearing may be fatal to the application, without automatically requiring *additional* notice and an opportunity to provide such evidence.<sup>248</sup> Although *In re L-A-C-* does not countenance an automatic continuance, the Board's approach to that question is, as well, a reasonable synthesis of the interests of the applicant and government; where the exact piece of corroborating evidence that the immigration judge deems necessary was not reasonably foreseeable, the immigration judge has the discretion to grant—and likely *should* grant—a continuance in order to provide the applicant an opportunity to obtain and proffer that evidence.<sup>249</sup> This approach ensures that applicants are held to their burden at the merits hearing, but also prevents unfair surprise regarding the need to submit evidence that they could not have reasonably foreseen as relevant.

The reasonableness of this approach is apparent from a review of the Third and Ninth Circuit cases reversing agency determinations based on the stricter, automatic continuance framework. In *Saravia*, the applicant failed to submit evidence from either his mother or a half-brother who lived in the United States, that would have corroborated his testimony relating to his gang-based claim of persecution, even though his mother actually attended his removal hearing.<sup>250</sup> It was obvious and reasonably foreseeable that this testimony would be relevant and highly probative of the veracity of the applicant's claim, but no testimony or other evidence was offered. At the hearing, counsel for *Saravia* had no excuse other than "time constraints," which was

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246. See 8 U.S.C. § 1158(b)(1)(B)(ii); see also *supra* §§ I.B, I.C, III.A-C; cf. *Sidhu v. INS*, 220 F.3d 1085, 1092 (9th Cir. 2000) (stating that the court "would reject" an "argument without hesitation" that precedent of a court of appeals fails to provide adequate notice of what the law requires and the obligations incumbent upon an applicant for asylum).

247. See *In re L-A-C-*, 26 I. & N. Dec. 516, 521 n.3 (BIA 2015).

248. See *id.* at 520–22.

249. See *id.* at 522 ("[A] continuance would typically be warranted where the Immigration Judge determines that the applicant was not aware of a unique piece of evidence that is essential to meeting the burden of proof.").

250. *Saravia v. U.S. Att'y Gen.*, 905 F.3d 729, 732–33 (3d Cir. 2018).

obviously irrelevant to the failure to proffer the mother as a witness at the hearing.<sup>251</sup>

Likewise, in *Bhattarai*, the applicant failed to offer any corroborating evidence from his brother, with whom he was then living, in support of his persecution claims.<sup>252</sup> The brother could have verified virtually every material aspect of the claim,<sup>253</sup> and this evidence was reasonably foreseeable as necessary for the applicant to carry his burden of proof. *Bhattarai* also highlights the potential for fraud and abuse in a notice-and-opportunity regime like the Ninth Circuit's. The applicant did, initially, submit corroborating evidence in the form of letters from organizations with which he had worked in Nepal, but these letters did not address the actual basis for his claim to asylum.<sup>254</sup> After the immigration judge's decision finding that he had failed to carry his burden of proof, the applicant requested and received additional letters that now "verif[ied] the specific attacks he suffered on particular dates."<sup>255</sup> But if these organizations previously had this knowledge, why was it not included in the letters originally offered as proof in the asylum proceeding? Perhaps with the notice of the evidentiary shortcomings in the applicant's case, the knowledge of those writing the letters was now triggered, allowing them to provide the complete picture. Nevertheless, the specificity of this recall is questionable; it is equally plausible that once holes in a case are exposed, corroborating evidence can be obtained targeting those holes with precision. Providing advance notice and an opportunity to obtain specific pieces of corroboration creates an environment susceptible to fraud and abuse, a particularly inappropriate outcome in this context where the REAL ID Act was enacted to cut back on perceived abuses of the asylum system by those seeking to exploit the evidentiary loopholes created by courts, first among them the Ninth Circuit.<sup>256</sup>

The better rule in cases like *Saravia* and *Bhattarai* is to allow the immigration judge to exercise his discretion to conduct the proceeding, including denying the application for failure to carry the applicant's burden of proof or considering a continuance to allow the applicant to obtain additional evidence. Such a rule, again, comports with how litigation is normally conducted in both civil and criminal contexts, and provides sufficient leeway for an applicant to present their claim while not unduly burdening the proceeding itself with delays and continuances to provide evidence that should have been submitted as part of the applicant's case-in-chief.

Finally, allowing the agency to craft its own framework for the consideration of corroborating evidence is consistent with background principles of

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251. *Id.* at 733.

252. *Bhattarai v. Lynch*, 835 F.3d 1037, 1046 (9th Cir. 2016).

253. *Id.*

254. *Id.* at 1047.

255. *Id.*

256. *See* Conf. Rept., *supra* note 90, at 160–61, 162–65.

administrative law. As the Supreme Court opined in *Vermont Yankee*, “this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”<sup>257</sup> This “broad discretion” is not without limitation, as the agency may not adopt procedures that would defeat its purpose or contradict its statute.<sup>258</sup> However, so long as agency procedures comport with constitutional and other legal requirements, they control even if a court believes the agency could adopt better procedures.<sup>259</sup> Here, constitutional concerns are not implicated by the Board’s corroboration framework, as there is more than sufficient notice to satisfy due process concerns. Moreover, there are no other legal impediments to imposition of that framework; it is at least consistent with the statutory language, while there is a strong argument that the Board’s interpretation is compelled by legislative intent.

In contrast, the Third and Ninth Circuit’s decisions violate the *Vermont Yankee* principle. These decisions impose procedural obligations on the agency with no explicit congressional authorization for those procedures. This imposition substantially increases the burdens on the agency. Rather than the pragmatic, case-by-case approach to corroboration authorized by the Board under *In re L-A-C-*, the Third and Ninth Circuits require an automatic continuance every time the agency concludes that additional corroboration would be required for the applicant to carry her burden. This is so regardless of how long the proceeding has been pending and despite the fact that the noted evidence was reasonably and foreseeably necessary for the applicant to carry her burden. The irony is that both the Third and Ninth Circuits have, in other contexts, noted the impermissibility of exactly what the *Saravia* and *Ren* decisions require—the imposition of extra-statutory procedures on an administrative agency.<sup>260</sup> Those courts erred, and in doing so ran afoul of *Vermont Yankee* by disregarding those precedents in this context.

#### CONCLUSION

The context of this article is, potentially, one of life or death. Individuals fleeing alleged persecution have a strong interest in a fair proceeding to adjudicate their claim to asylum relief, and that proceeding must consider the evidentiary shortcomings inherent in the process itself. The statute already reasonably accommodates such interest, providing that credible testimony

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257. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978); *see Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991).

258. *See Mourning v. Family Publ’ns Serv., Inc.*, 411 U.S. 356, 369 (1973).

259. *See Vt. Yankee*, 435 U.S. at 548–49 (stating that courts should engage in limited “review and not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”).

260. *See De Leon-Ochoa v. U.S. Att’y Gen.*, 622 F.3d 341, 353 (3d Cir. 2010); *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008).

alone may be sufficient to establish eligibility for relief, while corroborating evidence is only required in situations where it is “reasonably available.” In cases where credible testimony alone is insufficient, and where reasonably available corroborating evidence was not provided, neither the statute nor due process requires that the applicant be given additional notice and an opportunity to obtain evidence before the immigration judge may deny the application for failure of proof. Moreover, this approach to the burden of proof and corroborating evidence is consistent with how litigation is conducted in most, if not all, other contexts. In civil and criminal litigation, the party bearing the burden of proof must come to the hearing prepared to plead and present the entirety of her case. If a party fails to carry their burden at the close of evidence, that party loses.

*In re L-A-C-*, balancing the interests of the applicant and the government, is a reasonable approach to this question. It permits denial of the application upon the close of evidence if the burden has not been carried, but also encourages continuances where the evidence deemed necessary by the immigration judge was not reasonably foreseeable. It also does not place undue burdens on applicants to corroborate their claims, providing applicants an opportunity to explain why they could not provide certain evidence. It is only in circumstances where evidence was available, necessary to carry the burden of proof, and inexplicably absent that such failure will be held against the applicant. This is a permissible interpretation of Section 1158(b)(1)(B)(ii), to which the remaining undecided courts of appeals, and the Supreme Court to the extent it may become involved with the issue, should defer.