According to the Immigration and Nationality Act (INA), "[t]he 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."[30] Thus, there is a three-step test that an applicant's testimony must pass in order to be sufficient to sustain his or her burden of proof without corroboration.

The testimony must: (1) be credible;[31] (2) be persuasive; and (3) refer to specific facts.[32] For a detailed discussion of credibility determinations for meeting prong one of this test, see Part III.A. of this chapter. "Specific facts" refers to fact and not opinion testimony, and statements of belief are generally insufficient to meet the third prong of this test.[33]

In determining whether the applicant has met his or her burden, the trier of fact may weigh credible testimony along with other evidence of record.[34] Thus, even if testimony is found to be credible, the applicant may nonetheless fail to meet his or her burden of proof that he or she is eligible for asylum and merits a favorable exercise of discretion.[35] For example, "other evidence of record," such as country

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Matter of A–H–, 23 I&N Dec. 774 (AG 2005) (addressing the persecution of others and danger to the security of the U.S. bars to withholding of removal); *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984) (addressing the serious nonpolitical crime bar to withholding of removal).

[30] INA §208(b)(1)(B)(ii), as amended by §101(a)(3) of the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302, 303, div. B. The amendments apply to applications filed on or after the date of enactment, May 11, 2005.

[31] *See* INA §208(b)(1)(B)(iii) (addressing only the first prong of this test, "credibility"); *infra* pt. III.A. for a detailed discussion of credibility determinations.

[32] INA §208(b)(1)(B)(ii). *See also Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1953 (9th Cir. 1985) (emphasis in original) (stating that "Accordingly, if documentary evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and refers to '*specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds' listed in section 208(a).") *aff'd* 480 U.S. 421, 426 (1987) (noting that the Ninth Circuit U.S. Court of Appeals agreed with the U.S. Court of Appeals for the Seventh Circuit's finding in *Carvajal-Munoz*, 743 F.2d 562, 574 (7th Cir. 1984) which required the applicant provide 'specific facts' through the introduction of "objective evidence" to prove eligibility for asylum).

[33] *See Carvajal-Munoz*, 743 F.2d 562 (7th Cir. 1984) (explaining that "[s]tatements of belief are insufficient" and citing *Pereira-Diaz v. INS*, 551 F.2d 1149, 1154 (9th Cir. 1977) which held that the petitioner's claims were "essentially undocumented statements of belief"); *Khalil v. Dist. Dir.*, 457 F.2d 1276 (9th Cir. 1972) (finding that petitioner's beliefs that she would be persecuted were based "solely on statements" made by herself and her witness, and noting that she offered "No factual support which might have demonstrated the reasonableness of this belief was offered").

[34] INA §208(b)(1)(B)(ii). *See Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989) ("[W]here there are significant, meaningful evidentiary gaps, applications will ordinarily have to be denied for failure of proof.")

conditions reports, may establish that the applicant no longer has a well-founded fear of persecution because the conditions have changed or that the applicant can relocate internally to avoid persecution.

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.[36] According to the Board of Immigration Appeals (BIA), "[b]ecause the burden of proof is on the alien, an applicant should provide supporting evidence, both of general country conditions and of the specific facts sought to be relied on by the applicant, where such evidence is available. If such evidence is unavailable, the applicant must explain its unavailability."[37] For a detailed discussion of the corroboration requirements, see Part III.B. of this chapter.

Despite this burden of proof, an applicant for asylum or withholding of removal should be given the "benefit of the doubt" where the applicant is unable to substantiate his or her statements, but where the testimony is generally credible and does not run counter to generally known facts.[38] Moreover, justice requires that an applicant for asylum or withholding of removal be afforded a meaningful opportunity to establish his or her claim.[39] For example, there should be no rule that prevents an asylum applicant from elaborating on the circumstances underlying an asylum claim when given the opportunity to take the witness stand.[40] Overall, the procedures for requesting relief should not be a search for a justification to deport an applicant.[41]

Although the burden of proof is on the applicant, the BIA has recognized a "cooperative approach" because the immigration judge (IJ), BIA, and DHS "all bear the responsibility of ensuring that refugee protection is provided where such

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the required burden of proof); *Matter of Acosta*, 19 I&N Dec. 211, 214–15 (BIA 1985) (finding that an asylum applicant must persuade the adjudicator that the claimed facts are true and that he or she is eligible for asylum under the INA).

[36] INA §208(b)(1)(B)(ii). *See infra* pt. III. for a detailed discussion of the evidentiary requirements in asylum cases following the REAL ID Act of 2005, *supra* note 30, and pt. III.B. for a detailed discussion of the corroboration requirements.

[37] *Matter of S–M–J–*, 21 I&N Dec. 722, 724 (BIA 1997) (citing *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989)).

[38] *Id.* At 725. *See* this chapter at 2.6.4; *see also Matter of Pula*, 19 I&N Dec. 467, 476 (BIA 1987) (Heilman, concurring) (recognizing that asylum provisions are humanitarian in their essence and that the "normal" immigration laws cannot be applied in their usual manner to refugees), *superseded on other grounds by statute as recognized in Andriasian v. I.N.S.,* 180 F.3d 1033, 1043 (9th Cir. 1999).

[39] *See Matter of E–F–H–L–*, 26 I&N Dec. 319 (BIA 2014) (finding that an applicant for asylum or for withholding of removal is entitled to a hearing on the merits of those applications, including a testimony and other evidence, without first having to establish prima fac 20 I&N Dec. 116 (BIA 1989). *See also Senathiraj*

protection is warranted by the circumstances of an asylum applicant's claim."[42] In this regard, the adjudicator has an affirmative duty to elicit sufficient information and to research country conditions to properly evaluate whether the applicant is eligible for protection.[43] Speculation or conjecture by the adjudicator, however, is impermissible.[44]

B. The Shifting Burdens of Proof

In preparing and presenting applications for asylum, withholding of removal, and CAT protection, it is essential that applicants understand when it is their burden of proof and when it is the government's burden of proof. Although the burden of proof is generally on the applicant to establish eligibility for relief, the burden of proof shifts to the government in two situations.[45] First, if the applicant establishes past persecution on account of one of the protected grounds, there is a presumption that the applicant also has a well-founded fear of future persecution and the burden shifts to DHS to rebut that presumption.[46] DHS may rebut the presumption of a well-founded fear of future persecution in two ways. The government must show by a preponderance of the evidence either (1) that there has been a fundamental change in circumstances since the applicant suffered persecution such that the applicant's fear of future persecution is no longer well-founded,[47] or (2) that the applicant could avoid future persecution by relocating to another part of the country of feared persecution

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[42] *Matter of S–M–J–*, 21 I&N Dec. 722 (BIA 1997).

[43] 8 CFR §§208.9(b), 1208.9(b) (2014); *Matter of S–M–J–*, 21 I&N Dec. 722 (BIA 1997); U.N. High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status*, ¶¶ 196, 205(b)(i) HCR/1P/4/enG/Rev. 3 (2011) [hereinafter UNHCR Handbook] *available at www.refworld.org/docid/4f33c8d92.html*.

[44] *See, e.g., Jian He Zhang v. Holder*, 737 F.3d 501, 505–06 (8th Cir. 2013); *Xiu Ying Wu v. Att'y Gen.*, 712 F.3d 486 (11th Cir. 2013); *Yusupov v. Att'y Gen.*, 650 F.3d 968, 989–92 (3d Cir. 2011); *Tassi v. Holder*, 660 F.3d 710, 724 (4th Cir. 2011); *Chawla v. Holder*, 559 F.3d 998, 1007 (9th Cir. 2010); *Issiaka v. Att'y Gen.*, 569 F.3d 135, 138–41 (3d Cir. 2009); *Castilho de Oliveira v. Holder*, 564 F.3d 892, 896 (7th Cir. 2009); *Li v. Holder*, 559 F.3d 1096, 1102–07 (9th Cir. 2009); *Sok v. Mukasey*, 526 F.3d 48, 55–56 (1st Cir. 2008); *Torres v. Mukasey*, 551 F.3d 616, 631–32 (7th Cir. 2008); *Yan Xia Zhu v. Mukasey*, 537 F.3d 1034, 1038–40 (9th Cir. 2008); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007); *Huang v. Gonzales*, 453 F.3d 142, 147–79 (2d Cir. 2006); *Mwembie v. Gonzales*, 443 F.3d 405, 409–14 (5th Cir. 2006); *Alexandrov v. Gonzales*, 442 F.3d 395, 407–09 (6th Cir. 2006); *Pramatarov v. Gonzales*, 454 F.3d 764, 765–66 (7th Cir. 2006); *Chaib v. Ashcroft*, 397 F.3d 1273, 1278–80 (10th Cir. 2005); *Secaida-Rosales v. INS*, 331 F.3d 297, 307–12 (2d Cir. 2003); *Dia v. Ashcroft*, 353 F.3d 228, 247–60 (3d Cir. 2003) (*en banc*); *Ezeaawima v. Ashcroft*, 325 F.3d 396, 403–08 (3d Cir. 2003); *Shah v. INS*, 220 F.3d 1062, 1069 (9th Cir. 2000); *Matter of Kasinga*, 21 I&N Dec. 357, 364–65 (BIA 1996); *Matter of Becerra-Miranda*, 12 I&N Dec. 358, 368 (BIA 1967).

[45] *Matter of S–M–J–*, 21 I&N Dec. 722, 730 n. 11 (BIA 1997) ("[T]he burden of proof is on the applicant to establish her asylum claim. We do not intend our analysis regarding the roles of the Service and the Immigration Judge to shift this burden. If the Service and the Immigration Judge do not carry out their roles, the applicant does not prevail by default.")

and that, under all circumstances, it would be reasonable to expect him or her to do so.[48] Thus, an applicant who has established past persecution on account of a protected characteristic does not bear the burden of establishing that it would be unsafe or unreasonable to relocate within the country of feared persecution to avoid future persecution. The applicant also does not bear the burden of establishing a well-founded fear of future persecution on the basis of the initial claim. However, if the basis of the claim is on account of a different protected ground than the ground that motivated the past persecution, the applicant maintains the burden of demonstrating a well-founded fear of persecution on account of the new protected ground.[49]

The second situation where the burden shifts to DHS is if the claimed persecutor is a government actor or is government-sponsored. In these circumstances, the burden shifts to DHS to establish by a preponderance of the evidence that the applicant could avoid future persecution by relocating within the country of feared persecution and, under all the circumstances, it would be reasonable for him or her to do so.[50] Regardless whether the persecutor is a government or non-government actor, DHS also bears the burden of proving a safe and reasonable internal relocation option if the applicant has established past persecution on account of a protected characteristic, as described above.

In these two situations, in the context of affirmative asylum applications filed before U.S. Citizenship and Immigration Services (USCIS), the asylum officer must both produce and evaluate the evidence. He or she may produce the evidence by eliciting testimony and conducting country conditions research. The asylum officer must then consider all available information and make a determination.[51] In defensive asylum applications, the DHS Immigration and Customs Enforcement's Assistant Chief Counsel shoulders the burden of production and persuasion before the immigration judge in these scenarios.[52]

If DHS meets its burden of rebutting the well-founded fear of future persecution, the burden then shifts back to the applicant to demonstrate either that he or she does have a well-founded fear of future persecution or that the adjudicator's discretion is warranted for humanitarian reasons, even if future persecution is unlikely. He or she may do so by showing that there are "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or

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[48] 8 CFR §208.13(b)(1)(i)(B) (2014). *See also Balliu v. Gonzales*, 467 F.3d 609, 612 (7th Cir. 2006); *Un v. Gonzales*, 415 F.3d 205, 209 (1st Cir. 2005).

[49] 8 CFR §208.13(b)(1) (2014) ("If the applicant's fear of future persecution is unrelated to the past ... the applicant bears the burden of establishing that the fear is well-founded").