

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

A.M.,

Petitioner,

v.

TODD BLANCHE, Attorney
General,

Respondent.

No. 25-5415

Agency No.
A249-138-205

OPINION

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted May 20, 2026
Pasadena, California

Filed October 23, 2026

Before: N. Randy Smith, Mark J. Bennett, and Salvador
Mendoza, Jr., Circuit Judges.

Opinion by Judge Mendoza, Jr.;
Concurrence by Judge Mendoza, Jr.

SUMMARY*

Immigration

The panel granted a petition for review of the Board of Immigration Appeals' decision affirming the denial of asylum and related relief, and remanded, concluding that the agency misunderstood Petitioner's social group based on his bisexual orientation and erred by failing to give Petitioner notice and a meaningful opportunity to present additional corroborating evidence to support his claim.

Petitioner applied for relief based on his membership in a proposed social group consisting of "the LGBT community" or "queer Russian men." He claimed membership in this social group because he is bisexual. But the immigration judge misunderstood how sexual orientation is defined, reasoning that Petitioner had not met his burden of proving that he is a member of his proposed social group because he has never had sexual relations with either a man or a woman. This reflected a deeply erroneous and arbitrary understanding of bisexuality. A person's sexual orientation is not solely defined by their sexual relations.

The IJ's misunderstanding of bisexuality led to other factual errors. Because of these errors, the panel concluded that it was impossible to meaningfully review the agency's decision regarding whether Petitioner established membership in his proposed particular social group or whether there was a need for additional corroboration. The

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

agency's fundamental misunderstanding of the particular social group alone required remand.

The panel also concluded that the IJ violated 8 U.S.C. § 1158(b)(1)(B)(ii)'s notice-and-opportunity requirement by failing to give Petitioner an opportunity to present corroborating evidence pertaining to his sexuality. Considering the context of Petitioner's arguments before the Board, the panel concluded that Petitioner had adequately exhausted this issue in his agency appeal. The panel also rejected the government's contention that Petitioner had forfeited this issue before this court.

The panel concluded that the IJ failed to give Petitioner adequate notice of the need for additional corroborating evidence where she articulated for the first time in her decision denying relief that key corroborative evidence was missing. Petitioner therefore had no opportunity to provide testimony, the requested documents, or explain why he could not do so. And the record suggested that Petitioner may have been able to provide at least some of this evidence, if given time to collect it. The lack of corroboration therefore could not sustain the agency's conclusions that Petitioner failed to establish past persecution, a well-founded fear of future persecution, or a likelihood of torture based on his sexual orientation.

Concurring, Judge Mendoza wrote separately to emphasize that the IJ's basic misunderstanding of bisexuality hamstrung Petitioner's entire case. Although Judge Mendoza agreed that the panel need not reach the merits of Petitioner's claims for relief, he wrote that it is important to note that Petitioner submitted considerable evidence of state-sanctioned homophobia. Had the IJ adopted the appropriate definition and found that Petitioner

is bisexual, she may well have concluded that he had established a well-founded fear of persecution, or even if he did not present sufficient evidence that he would be singled out for persecution in Russia, he could have alternatively established “a pattern or practice of persecution” of bisexual men. Moreover, nothing in the record supported the idea that the Russian capital would be more accepting of LGBTQ+ individuals should Petitioner attempt to relocate internally. Judge Mendoza wrote that on remand the agency should take into account the considerable evidence of widespread, state-endorsed homophobia in Russia.

COUNSEL

Elena L. Gutiérrez (argued), Casa Cornelia Law Center, San Diego, California, for Petitioner.

Joseph D. Hardy (argued), Trial Attorney; Anthony C. Payne, Assistant Director; Office of Immigration Litigation; Brett A. Shumate, Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

MENDOZA, JR., Circuit Judge:

An applicant may qualify for asylum or withholding of removal if he is unable to return to his country because of persecution based on his membership in a “particular social group.” Such groups are based on certain shared, immutable characteristics fundamental to the individual identities or consciences of their members. We have long recognized that sexual orientation and gender identity can be the basis for establishing a “particular social group.” So, when the agency misunderstands or misapplies these concepts, remand is required for the agency to properly reevaluate the proposed social group and whether the applicant is a member of that group.

In some cases, an applicant may establish their membership in a particular social group through credible testimony alone. But if an Immigration Judge (“IJ”) decides that such testimony is not enough, they cannot hide the ball. They must tell the applicant what additional corroboration is needed and give the applicant a chance to either provide it or explain why it cannot be obtained. Here, the IJ misunderstood the applicant’s proposed social group. Further, though she indicated that corroborative evidence was needed to establish his membership in the group, she did not allow him the opportunity to provide such evidence. Instead, she identified the missing evidence only when announcing her decision denying the applicant relief. Because the agency’s decision was premised on multiple errors, we grant the petition for review and remand the case for further proceedings.

I. BACKGROUND

A. Facts

A.M. is a bisexual man and a native and citizen of Russia. He petitions for review of the denial of his application for asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”).

A.M. first realized he was attracted to other men in 2015, when he was eleven years old. He decided to come out to his mother in a written letter two years later, but her partner at the time found the letter first. The partner hit A.M. in the abdomen, verbally assaulted him, and boasted about previously beating up a gay man in the army. A.M. eventually spoke with his mother, but she told him that she could not accept his sexuality. She did, however, refuse her partner’s attempts to have her son forcefully committed to a program intended to change his sexual orientation.

The partner left the family. Shortly thereafter, A.M.’s classmates began to taunt him repeatedly, hitting him, throwing his stuff around, and using homophobic slurs. A.M. transferred schools, hiding his sexual orientation in hopes of avoiding further harm.

The workplace offered no refuge. A.M. faced the same hostility. In May 2023, he was called into his boss’s office to talk about his appearance. A.M. was told to throw his piercings, rings, and choker into the garbage. When he refused, his boss threatened to fire him pursuant to a statute of the labor code that would have prevented him from working again in the future. A.M. resigned. In April 2024, at a subsequent job, A.M. was summoned by his new boss and was informed that someone had reported seeing A.M. kissing another man. A.M.’s boss demanded a voluntary

resignation letter. This time, when A.M. objected, his boss threw a mug at him, hitting him in the ribcage. A.M. resigned.

Two days later, A.M. attended a compulsory military medical examination at his college. Afraid that he would be harmed while undergoing military service because of his sexual orientation, A.M. asked a female doctor if there was anything he could do to avoid enlisting. But the doctor mocked and insulted him, threatening to send him to a psychiatrist who would “send [him] to a clinic for compulsory treatment, where ‘they rehabilitate people like [him].’” A.M. left before the end of the examination. Word of what happened during the examination spread, and A.M. was confronted by four of his classmates later that day. A.M.’s classmates called him homophobic slurs, punched him, and kicked him. A.M. tried to free himself, but one of his attackers grabbed him by the hair and dragged him across sharp stones. The beating stopped only when a passerby intervened. One of the attackers told A.M. that he “would be back to finish the job.” A.M. was left with scars on his right hip, left knee, and right elbow.

Following the attack, A.M.’s mother called an ambulance. The paramedics treated his wounds but dismissed the need to visit a hospital. They did call the police, who arrived half an hour later. But when A.M. told the police he believed he had been attacked because of his sexuality, the police told him that his attackers “did the right thing.” He later tried to file a complaint with the police precinct but received a similar reaction. When A.M.’s mother called to follow up on the complaint two weeks later, she was told no such complaint existed in the database.

Following these traumatic experiences, A.M. fled Russia, concerned for his safety. But even after leaving, the targeting continued. He received text messages from former friends and acquaintances, calling him homophobic slurs and threatening to beat him up if he ever returned. A.M. learned that one of his attackers had gone to his apartment to look for him. Someone had put flyers in all of his neighbors' mailboxes with his photograph and warning that police were investigating him for "LGBT propaganda." And police had visited A.M.'s apartment, spoke with his mother, and threatened to physically harm him and begin criminal proceedings against him for spreading "LGBTQ+ propaganda."

B. Procedural History

A.M. filed applications for asylum, withholding of removal, and CAT protection. After a hearing on the merits, the IJ denied all three claims for relief. The IJ first discussed her concerns with A.M.'s credibility and the evidence he presented to meet his burdens of proof. She did not make an adverse credibility finding, but made two factual findings: first, that A.M. did not have "credible evidence to show . . . that he is bisexual"; and second, that A.M. had not shown that he "has suffered significant harm amounting to persecution because of his sexual orientation." The IJ specifically found that A.M.'s statement concerning his bisexuality was "severely undercut by his disclosure at trial that he has never had a sexual relationship with a man or a woman." And though she credited A.M.'s testimony that he has previously dated three men and two women, she reasoned that "[h]aving an attraction to both men and women is not the same as being bisexual" and that there was "no indication that [A.M.] had any romantic involvement with a woman."

The IJ emphasized that outside of A.M.’s testimony, there was “a lack of objective, corroborative evidence to substantiate his claim of membership in the LGBT community.” She then stated that he could have provided the following evidence to “help[] . . . corroborate [his] claim”: “affidavits verifying [his] sexual orientation,” a “letter from a mental health professional attesting to [his] gender identity,” or “social media posts from [A.M.] himself that demonstrate support for the LGBT community while living in Russia.”

A.M. timely appealed the IJ’s decision to the Board of Immigration Appeals (“BIA”), which affirmed the IJ, concluding that the evidence A.M. presented was “insufficiently persuasive to satisfy his burdens of proof.” It reiterated that A.M. had “not provided persuasive evidence that he is bisexual or has been singled out for harm in Russia.”

II. STANDARD OF REVIEW

We start by looking at the BIA’s decision. “Where the BIA conducts its own review of the evidence and law, rather than adopting the IJ’s decision,” we limit our review to what the BIA itself decided. *Rodriguez v. Holder*, 683 F.3d 1164, 1169 (9th Cir. 2012) (citation modified). We consider the IJ’s opinion only to the extent that the BIA expressly adopted it. *Id.* We review questions of law de novo and factual findings for substantial evidence. *Bhattarai v. Lynch*, 835 F.3d 1037, 1042 (9th Cir. 2016). Under the substantial evidence standard, we will uphold a finding “unless any reasonable adjudicator would be compelled to conclude to the contrary.” *Id.* (quoting *Garcia v. Holder*, 749 F.3d 785, 789 (9th Cir. 2014)).

III. DISCUSSION

This appeal considers two interlocking issues: first, whether the IJ correctly understood A.M.’s proposed social group; and second, whether the IJ afforded A.M. a meaningful opportunity to present evidence corroborating his claims. A.M. argues that the IJ mistakenly found that he is not bisexual, and further erred by failing to notify him of the perceived evidentiary shortcomings before announcing her decision in violation of 8 U.S.C. § 1158(b)(1)(B)(ii).¹ We first consider the IJ’s assessment of A.M.’s proposed social group.

A. The IJ misunderstood A.M.’s proposed social group, leading to critical factual errors.

A.M. applied for asylum based on his membership in a proposed social group consisting of “the LGBT community” or “queer Russian men.” He claimed membership in this social group because he is bisexual. But the IJ misunderstood how sexual orientation is defined, reasoning that A.M. had not met his burden of proving that he is a

¹ Section 1158(b)(1)(B)(ii) provides:

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. . . . 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.

8 U.S.C. § 1158(b)(1)(B)(ii).

member of his proposed social group because he has never had sexual relations with either a man or a woman. This reflects a deeply erroneous and arbitrary understanding of bisexuality. A person's sexual orientation is not solely defined by their sexual relations.

Rather, "bisexuality" "[d]escribes people who have *the capacity* for romantic, emotional, and/or physical attraction to people of more than one gender." UNHCR, *Multilingual Glossary of Terms on Sexual Orientation, Gender Identity, Gender Expression, and Sex Characteristics*, 8 (April 2024), <https://perma.cc/KR9C-NPFD> (emphasis added). A.M. presented evidence that meets this definition: he testified that he was attracted to both men and women; that he had three boyfriends and two girlfriends in Russia; that these relationships were romantic in nature; and that he had kissed, hugged, and been otherwise affectionate with these partners.

The IJ's misunderstanding of bisexuality led to other factual errors. First, A.M. testified that he had girlfriends in Russia, so it was not the case that there was "no indication [A.M.] had any romantic involvement with a woman." Second, A.M. testified to having relationships with men, and that his relationships were romantic in nature, so it was not the case that A.M. offered only a "single romantic or sexual gesture in all the evidence presented to the court." And the evidence that a flyer was circulated to A.M.'s neighbors claiming that police were investigating him for "LGBT propaganda" *supports* A.M.'s claims. It is not a contradiction to call someone who is bisexual "gay"; rather, the term mischaracterizes a person's identity by using a broader label. Despite the mislabeling, the flyer still functions as evidence that A.M. was targeted by anti-LGBTQ+ persons in Russia, not as evidence raising

questions about A.M.’s specific identity.² Because of these errors, it is impossible for us to meaningfully review the agency’s decision regarding whether A.M. established his membership in the proposed particular social group or whether there was a need for additional corroboration. The agency’s fundamental misunderstanding of the particular social group alone requires remand.

B. The IJ failed to provide A.M. with the requisite notice and opportunity to corroborate membership in his proposed social group.

We next turn to A.M.’s argument regarding corroboration. But before we reach the merits of his argument, we must first address the government’s threshold arguments concerning exhaustion and forfeiture.

1. Exhaustion

An appellate court is not the place to debut arguments never presented to the agency. Indeed, before we may consider a legal argument on appeal, a petitioner generally must first present it to the agency below. This “exhaustion” requirement ensures that the agency has the first “bite at the apple” to address any alleged error. Because A.M. filed a brief before the BIA, it was “entitled to look to the brief for an explication of the issues” for which A.M. sought review. *Abebe v. Mukasey*, 554 F.3d 1203, 1208 (9th Cir. 2009). So,

² Significantly here, the use of the word “gay” was meant to be an insult—homophobia in Russia is deeply pervasive, and the social meaning of the word relies on the assumption that being gay is something degrading. The label functions as an insult, not as a technically accurate description of A.M.’s specific identity. This type of derogatory language frequently relies on sweeping labels and outdated thinking to demean LGBTQ+ persons.

A.M. “exhausted only those issues he raised and argued in his brief before the BIA.” *Id.*

This does not mean that issues need to be briefed perfectly. *See Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020). We have said that something more than a “general challenge to the IJ’s decision is required,” *id.* (quoting *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004)), but neither “precise legal terminology” nor a “well developed argument” is a necessity. *Umana-Escobar v. Garland*, 69 F.4th 544, 550 (9th Cir. 2023) (quoting *Arsdi v. Holder*, 659 F.3d 925, 929 (9th Cir. 2011)). The fundamental question is whether “the BIA was sufficiently on notice so that it had an opportunity to pass on the issue.” *Bare*, 975 F.3d at 960 (citation modified). This means that a petitioner may present a “sub-argument enlarging on an issue that was properly exhausted before the agency.” *See Shen v. Garland*, 109 F.4th 1144, 1158 (9th Cir. 2024).

So, how do we distinguish between cases involving only an “enlargement” of questions presented below and those involving entirely new questions? Context is key. In *Ren v. Holder*, for example, we concluded that exact phrasing was not needed to satisfy the exhaustion requirement. 648 F.3d 1079 (9th Cir. 2011). At the core, the petitioner there challenged the IJ’s determination that he lacked corroborating evidence to support his claim. The petitioner, proceeding pro se, did not file a brief before the BIA. *Id.* at 1084. In his notice of appeal, he did not use the specific word “corroboration,” but did state his belief that he had met his burden of proof. *Id.* We concluded that this statement constituted sufficient notice to the BIA because “[t]he IJ had explicitly described her corroboration finding as a finding that [the petitioner] had ‘failed to meet his burden of proof.’”

Id. So, in that context, the petitioner had “raised a specific challenge to the IJ’s corroboration determination.”³ *Id.*

We draw a similar conclusion from *Bare v. Barr*. There, the petitioner argued in his brief to the BIA that “the IJ failed to consider the appropriate factors and relied on improper evidence in making the particular[ly] serious determination.” 975 F.3d at 960. The IJ’s written opinion explicitly addressed only the second factor of a three-factor test used to determine whether a crime is particularly serious. *Id.* But we held that the BIA was sufficiently on notice that petitioner was challenging the first factor of the test. Because there are only three factors, and because the IJ’s written opinion explicitly noted the second factor, we reasoned that the *context* gave the BIA sufficient notice that the petitioner was challenging the IJ’s failure to consider the first factor in making the argument that “the IJ failed to consider the appropriate factors.” *Id.*

By contrast, *Umana-Escobar v. Garland* offers an example of distinct arguments we found had not been properly exhausted. The petitioner in *Umana-Escobar* argued before the BIA that it should terminate his removal proceedings because the Notice to Appear omitted required information, thus depriving the IJ of jurisdiction. 69 F.4th at 550. But on appeal before this court, the petitioner argued that the BIA “should have terminated his proceedings because the defective [Notice to Appear] amounted to a *claim-processing violation*.” *Id.* (emphasis added). The arguments were different: the petitioner’s original argument

³ The petitioner specifically stated, “I believe that I did establish that my life/freedom would have been threatened in China on account of my strong beliefs and practice of Christianity.” *Ren*, 648 F.3d at 1084. He did not, nor was he required to, say, “I met my burden of proof.” *Id.*

before the BIA “sounded exclusively in jurisdiction,” such that the BIA “had no reason to consider whether the [Notice to Appear’s] defects could constitute some other type of violation which might be subject to waiver, such as a claim-processing violation.” *Id.*

Context is helpful in our case, too. The government contends that A.M. failed to exhaust any challenge to the IJ’s finding “that he failed to sufficiently corroborate his allegations that he is bisexual or that anyone has any interest in persecuting him in the future.” We disagree.

As in *Ren*, the IJ here concluded that A.M. failed to meet his burdens of proof *because* of “[t]he lack of independent corroborative evidence and the reliance on [A.M.’s] own testimony.” Accordingly, in his brief before the BIA, A.M. repeatedly argued that corroboration “was unneeded” because his “credible testimony and corroborative evidence satisfied his evidentiary burden.” At one point, he stated that “credible testimony and corroborative evidence satisfied his evidentiary burden.” Later, A.M. stated that “[t]he IJ erred by misapplying the law on corroboration and giving undue weight to the purportedly absent evidence.”

A.M.’s arguments certainly are not a model of clarity. And we recognize that these arguments largely concern the sufficiency of the evidence, as opposed to the notice-and-opportunity requirement outlined in § 1158(b)(1)(B)(ii). Indeed, A.M. made little reference to the requirement in his BIA brief. In the section summarizing his argument, he stated only: “Further, should additional corroboration be deemed necessary, the IJ did not give Respondent proper notice or an opportunity to provide it or explain its unavailability.” And in the argument section, he cited § 1158(b)(1)(B)(iii) and discussed the IJ’s failure to make an

explicit adverse credibility determination, but did not give any accompanying discussion of corroboration.

Yet we look at substance over form. Again, the crux of the issue on appeal is whether the IJ provided A.M. with the requisite notice and opportunity to provide corroborating evidence. This specific argument on appeal falls neatly under the more general issue A.M. raised before the BIA—the IJ’s “misappl[ication] of the law on corroboration.” Put another way, A.M.’s specific argument that the IJ violated § 1158(b)(1)(B)(ii) by failing to provide him with notice and an opportunity to corroborate “is a permissible sub-argument enlarging on an issue that was properly exhausted before the agency.” *Id.* at 1158. We reiterate that “[w]e do not employ the exhaustion doctrine in a formalistic manner.” *Ren*, 648 F.3d at 1083 (citation modified). In presenting arguments challenging the IJ’s corroboration analysis, A.M. said more than enough about issues that “form the basis” of his appeal. *Shen*, 109 F.4th at 1158. He therefore kept his claim alive.

2. Forfeiture

The second question is whether A.M. waived or forfeited this claim on appeal by failing to raise it in his opening brief. “The terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous.” *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 n.1 (2017). “[W]aiver is the intentional relinquishment or abandonment of a known right,” while “forfeiture is the failure to make the timely assertion of a right.” *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (citation modified). Generally, “arguments . . . omitted from the opening brief are usually deemed forfeited.” *Lui v. DeJoy*, 129 F.4th 770, 780 (9th Cir. 2025) (citation modified); *see also Hernandez v. Garland*, 47 F.4th

908, 916 (9th Cir. 2022) (holding petitioner forfeited an argument by failing to “specifically and distinctly” argue the error in his opening brief).

Although we generally will not review claims raised for the first time in a reply brief, *Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004), “[w]e have discretion to review an issue not raised by appellant when it is raised in the appellee’s brief” and “can also review a forfeited issue if the failure to raise the issue properly did not prejudice the defense of the opposing party.” *Lui*, 129 F.4th at 780 (citation modified). Here, the government first raised the issue of corroboration in its brief when arguing that A.M. failed to exhaust his claims. A.M. challenged the government’s assertion in his reply brief. We discern no reason why A.M.’s failure to raise the issue properly prejudiced the government’s defense.

Moreover, even if A.M. forfeited this issue, we can address the issue if it meets one of three limited exceptions: (1) when “review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process”; (2) “when a new issue arises while appeal is pending because of a change in the law”; and (3) “when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.” *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014) (quoting *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012)); *see also Shen*, 109 F.4th at 1159 n.5 (explaining that we may consider “an otherwise forfeited issue” where “review is necessary to prevent a

miscarriage of justice or to preserve the integrity of the judicial process” (quoting *Armstrong*, 768 F.3d at 981)).⁴

As discussed below, the IJ flagrantly violated 8 U.S.C. § 1158(b)(1)(B)(ii)’s notice-and-opportunity requirement. Instead of asking A.M. whether he could provide additional corroborating evidence to support his claims, the IJ simply denied relief. Her failure to inform A.M. of this evidentiary deficiency until her decision a week later meant that A.M. had no chance to provide the missing evidence needed to meet his burden of proof. This is no small matter. By failing to give A.M. notice and an opportunity to respond, the IJ violated a procedural due process right guaranteed by Congress and enshrined by statute. This violation “implicates the integrity of these proceedings,” and “review is necessary to prevent a miscarriage of justice.” *See Shen*, 109 F.4th at 1159 n.5. We therefore exercise our discretion to consider this issue.

3. Corroboration

A week after the close of the merits hearing, the IJ determined that A.M. failed to meet his burden of proof with

⁴ As noted, and perhaps due to the inconsistent usage of the two terms, *Armstrong* did not speak of these exceptions in forfeiture terms and instead applied a “rule of waiver.” *See Armstrong*, 768 F.3d at 981. But we have since applied the same test to forfeited issues, *see Shen*, 109 F.4th at 1159 n.5, and elect to do so again here. Moreover, the issue in *Armstrong* was whether we could review arguments that were not properly raised before the district court, so to the extent those arguments were unintentionally relinquished (as it appears they were), *Armstrong* appears to be a case of forfeiture rather than a case of waiver. *Cf. Alvarado v. Wal-Mart Assocs., Inc.*, 156 F.4th 917, 922 n.2 (9th Cir. 2025) (noting that defendant “forfeited [an] argument by not raising it before the district court”). Accordingly, the *Armstrong* exceptions can be comfortably applied here.

regard to his proposed social group. The IJ did not make an explicit adverse credibility finding, but the BIA assumed on appeal that A.M.'s testimony was credible. Because A.M. was found credible, we must next address whether the IJ violated § 1158(b)(1)(B)(ii)'s notice-and-opportunity requirement by failing to give A.M. the opportunity to present corroborating evidence pertaining to his sexuality.

An applicant for asylum and withholding of removal bears the burden of establishing eligibility. 8 U.S.C. §§ 1158(b)(1)(B)(i), 1229a(c)(4)(A). Under the REAL ID Act, an applicant may establish eligibility for relief on his credible testimony alone, without any corroboration. 8 U.S.C. § 1158(b)(1)(B)(ii). But if the IJ determines that the credible testimony is not sufficient by itself, then they may require corroborative evidence. To succeed, the applicant must then provide such evidence unless they do not have and cannot reasonably obtain it.⁵ *Id.*

Critically, in these cases, “the IJ *must* give the applicant notice of the corroboration that is required and an opportunity either to produce the requisite corroborative evidence or to explain why that evidence is not reasonably available.” *Yali Wang v. Sessions*, 861 F.3d 1003, 1009 (9th Cir. 2017) (emphasis added) (quoting *Ren*, 648 F.3d at 1093). Three “future-oriented” clauses dictate this reading: (1) the requirement that an applicant “*should* provide evidence,” as opposed to “*should have* provided evidence”;

⁵ This corroborative evidence must be *reasonably obtainable*; the IJ cannot make outlandish evidentiary requests that are impossible to satisfy. See *Shrestha v. Holder*, 590 F.3d 1034, 1047–48 (9th Cir. 2010) (examining whether corroborative evidence is “reasonably obtainable”). Where evidence is not reasonably available, the applicant must explain why that is so.

(2) the requirement that evidence “must *be* provided,” as opposed to “must *have been* provided”; and (3) the language concerning an applicant who “does not have” and “cannot reasonably attain” corroborating evidence. *Zhi v. Holder*, 751 F.3d 1088, 1094 (9th Cir. 2014) (discussing *Ren*, 648 F.3d at 1091–92).

The notice-and-opportunity requirement means that “an IJ cannot articulate for the first time in her decision denying relief that key corroborative evidence is missing.” *Bhattarai*, 835 F.3d at 1043. “If the IJ or BIA failed to provide the required notice and opportunity, we must grant the petition and remand.” *Id.*; *see also Lai v. Holder*, 773 F.3d 966, 975–76 (9th Cir. 2014) (granting petition where notice-and-opportunity requirement was violated); *Zhi*, 751 F.3d at 1094–95 (same). This “ensures that an applicant is not turned away merely because he happens to provide, in good faith, meaningful corroborating evidence that is different than the evidence sought by the IJ.” *Jie Shi Liu v. Sessions*, 891 F.3d 834, 839 (9th Cir. 2018).

Notice and an opportunity to be heard demands more than mere lip service: an applicant must have an actual, meaningful opportunity to understand the issue and present a response. In the context of evidentiary inadequacies, that often means giving the applicant time to gather additional evidence. In *Ren v. Holder*, the IJ asked the applicant about several documents at the initial merits hearing. 648 F.3d at 1093. The IJ went further at the second hearing, identifying “not only the testimony for which corroboration was necessary, but also the specific items of corroborative evidence that [the applicant] should provide,” including specific documents and a live witness. *Id.* Yet at the third hearing, held approximately five months later, the applicant still failed to present the requested documents and the

requested live witness. *Id.* That was sufficient notice and opportunity. *Id.*

Similarly, in *Jie Shi Liu v. Sessions*, we concluded that the applicant had sufficient notice that corroboration was needed. 891 F.3d at 839. There, the IJ informed the applicant of the need for additional corroboration prior to the evidentiary hearing, but no such evidence was provided at the subsequent hearing on the merits eleven months later. *Id.* at 837. We concluded that eleven months was “sufficient time to produce corroborating documents,” and that the notice was “specific enough to satisfy the requirements identified by *Ren*.” *Id.* at 839.

By contrast, in *Bhattarai v. Lynch*, we concluded that the notice-and-opportunity requirement had not been met. 835 F.3d at 1046–47. The IJ identified two missing pieces of corroborating evidence: with regard to the first, we agreed that substantial evidence supported the IJ’s determination that the applicant’s brother “might have corroborated” the applicant’s testimony. *Id.* at 1046. The applicant’s brother, however, did not have an opportunity to testify before the IJ denied the applicant asylum; and at the end of the merits hearing, the IJ ordered the evidentiary record “closed,” thus preventing the applicant from being able to provide the testimony or to explain why he could not do so. *Id.* at 1046–47. Notably, we rejected the government’s argument that the petitioner was put on notice when he was asked why his brother had not appeared to testify and when the IJ overruled his objection to the questions on the ground that the line of questioning “went to credibility.” *Id.* at 1046.

With regard to the second piece of evidence, we noted that “[t]he IJ never mentioned the inadequacy of the supporting letters [the applicant] submitted, or suggested a

need for more specific documents corroborating dates and details, until she announced her decision.” *Id.* at 1047. Accordingly, the applicant “could not act on the IJ’s determination that he should provide corroboration because he was not given notice of that determination until it was too late to do so.” *Id.* (quoting *Ren*, 648 F.3d at 1091) (citation modified). We thus remanded the case for the BIA to give the applicant the opportunity to provide the necessary corroborative evidence or explain why it was not reasonably available. *Id.*; *see also Zhi*, 751 F.3d at 1095 (holding that the IJ erred in part “because she did not provide notice to [the applicant] that he was required to present the corroborative evidence she referred to in her decision” or “an opportunity to explain why such evidence might be unavailable”); *Munyuh v. Garland*, 11 F.4th 750, 763 (9th Cir. 2021) (“The IJ therefore erred by failing to give [the applicant] adequate notice that she was required to present such corroborative evidence and the opportunity either to obtain it or explain why it was unavailable.”).

The IJ here similarly failed to give A.M. notice that additional corroborating evidence was needed and the opportunity to either provide that evidence or explain why he could not do so. To be clear, the IJ did not issue an adverse credibility determination. *Cf. Yali Wang*, 861 F.3d at 1009 (reasoning that *Ren* was inapplicable where petitioner was found not credible and where IJ did not request additional evidence to corroborate otherwise credible testimony). But in her decision, the IJ stated that while A.M. had provided some corroborating evidence, additional corroborating evidence was needed to “substantiate [his] claim that he’s a member of the LGBT community.” For the first time *ever*, she explained that “[e]vidence that would have helped to corroborate [his]

claim includes, but is not limited to, affidavits verifying [his] sexual orientation. A letter from a mental health professional attesting to [his] gender identity. Or social media posts from [A.M.] himself that demonstrate support for the LGBT community while living in Russia.”⁶

Yet there is no indication in the record that the IJ mentioned the need for any of this evidence before she announced her decision. A.M. therefore had no opportunity to provide testimony, the requested documents, or explain why he could not do so. *See Ren*, 648 F.3d at 1091. And the record suggests that A.M. may have been able to provide at least some of this evidence, if given time to collect it: when asked by the IJ if he had made any social media posts in an LGBTQ+ group he was in, A.M. testified that he had. When asked whether he had any proof, A.M. responded: “It’s on my phone, but I don’t have access to it right now.” When asked whether anyone else knew he is bisexual, A.M. said that there was another friend who made social media posts back in January 2022. This questioning did not constitute notice. *Cf. Bhattarai*, 835 F.3d at 1046–47 (holding notice was not provided where applicant was asked during his hearing why he did not present certain evidence that the IJ later stated was necessary to corroborate his claim). Because the IJ waited until her oral decision (a week after the hearing concluded) to announce the specific pieces of corroborative evidence that she believed A.M. should have provided, A.M. did not have the opportunity to provide that evidence. *Cf. id.* The lack of corroboration therefore cannot sustain the

⁶ Importantly, the second of these pieces of evidence—a letter from a mental health professional attesting to A.M.’s gender identity—would not have corroborated his claim, even if provided. Gender identity and sexual orientation are two distinct concepts. Proof that A.M. identifies as a man would not substantiate his claim that he is bisexual.

agency's conclusions that A.M. failed to establish past persecution, a well-founded fear of future persecution, or a likelihood of torture based on his sexual orientation.⁷

IV. CONCLUSION

Because the agency misunderstood A.M.'s proposed social group and failed to provide A.M. notice and an opportunity to corroborate his claims, its determinations are not supported by substantial evidence.

On remand, the BIA shall vacate its August 25, 2025 order dismissing A.M.'s appeal and then remand to the IJ with instructions to: (1) reopen A.M.'s individualized hearing; (2) reexamine whether A.M. is a member of his proposed social group; (3) if corroborative evidence is needed, provide A.M. with notice of the evidence required and an opportunity to either produce the evidence or explain why it is unavailable; and (4) reexamine whether A.M.'s credible testimony, when properly considered alongside the corroborating evidence (including any new evidence submitted by either party and A.M.'s explanation as to why certain evidence is unavailable), proves A.M.'s claims for (i) asylum, (ii) withholding of removal under the INA, or (iii) protection under CAT. We take no position on whether A.M. merits any of the relief for which he applied.

**PETITION FOR REVIEW GRANTED;
REMANDED.**

⁷ We need not reach the other issues A.M. raises since we dispose of this case on the grounds discussed.

Mendoza, Jr., Circuit Judge, concurring:

I write separately to emphasize that the IJ's basic misunderstanding of bisexuality hamstrung A.M.'s entire case. The IJ concluded that A.M. failed to establish a well-founded fear of persecution based on his sexual orientation, in large part because he "has never had a sexual relationship with a man or a woman," and that he was therefore ineligible for asylum, withholding of removal, and CAT protection. But had the IJ adopted the appropriate definition and found that A.M. is bisexual, she may well have concluded that A.M. established a well-founded fear of persecution. Even if A.M. did not present sufficient evidence that he was "singled out for harm in Russia," he could have alternatively established "a pattern or practice of persecution" of bisexual men in Russia. *Bromfield v. Mukasey*, 543 F.3d 1071, 1079 (9th Cir. 2008); *Rusak v. Holder*, 734 F.3d 894, 896 (9th Cir. 2013). The IJ may well have also concluded that country conditions evidence established that A.M. was eligible for CAT protection. See *Antonio v. Garland*, 58 F.4th 1067, 1077–78 (9th Cir. 2023) (remanding with instructions for agency to consider whether previously-considered country reports established governmental involvement or acquiescence); *Gonzalez-Caraveo v. Sessions*, 882 F.3d 885, 894 (9th Cir. 2018) ("A CAT applicant may satisfy his burden with evidence of country conditions alone." (citation modified)). Indeed, "[w]idespread mistreatment of a certain group of people may well be relevant to an applicant's claim that he faces a clear probability of torture upon return, depending upon the facts of the case." *Wakkary v. Holder*, 558 F.3d 1049, 1068 (9th Cir. 2009).

I agree that we need not reach the merits of A.M.'s claims for relief, but I think it is important to note that A.M.

submitted *considerable* evidence of state-sanctioned homophobia. Among other things, in 2013, the Federal Assembly enacted a “gay propaganda” ban, forbidding “propaganda of nontraditional sexual relationships” among minors. It extended this ban in 2022 to cover all public information or activities supporting LGBTQ+ rights or displaying non-heterosexual orientation. Such was the perniciousness of homophobia in Russia that in 2021, Russian lawmakers went so far as to enact a ban on same-sex marriage in Russia’s constitution. Russian authorities thereafter designated seventeen LGBTQ+ organizations as “foreign agents.” The Russian court system offered no refuge. In 2023, the Supreme Court of the Russian Federation ruled that the “international LGBT movement” is an “extremist organization,” meaning that individuals who are found guilty of participating in or financing the movement may be imprisoned for up to twelve years. There have also been several documented attacks on the LGBTQ+ community throughout Russia, including death threats and murders. A study conducted by researchers at the University College of Dublin found that homophobic violence increased in Russia following the “gay propaganda” law: between 2010 and 2020, at least 1,056 hate crimes were committed against 853 individuals, with 365 fatalities.

All of this is to say that A.M.’s sexuality puts him at a very real risk of harm if he returns to Russia. There was some suggestion by the IJ that relocation was an option because “there exists the possibility that he can relocate to a community where he can dress as he wants without such scrutiny, such as Moscow with its 13 million people.” But that conclusion reeks of unsupported assumptions about this community. Nothing in the record supports the idea that the Russian capital would be more accepting of LGBTQ+

individuals. Again, A.M. presented considerable evidence of widespread, state-endorsed homophobia. The agency should take this into consideration when evaluating A.M.'s applications on remand.