

## LEGISLATIVE REFORM

# Changes to the Lautenberg Amendment May Even The Score For Asylees

### I. INTRODUCTION

In 1993, Yuri came to the United States, as his mother and sister did, to escape religious persecution in his native Ukraine.<sup>1</sup> He testified in front of an immigration judge that he had suffered discrimination and harassment in the former Soviet Union and Ukraine because he is an evangelical Christian.<sup>2</sup> Yuri's family was the only Baptist family in his small village and because of this his family was ostracized and harassed by the authorities and other villagers.<sup>3</sup> In 1992, Yuri, his mother and sister and her family applied for refugee status with the United States.<sup>4</sup> His mother, sister, and her family were granted permission to emigrate to the United States under the Lautenberg Amendment.<sup>5</sup> The Lautenberg Amendment allows certain categories of aliens who are nationals and residents of the former Soviet Union to emigrate to the United States.<sup>6</sup> However, Yuri was unable to accompany his other family members because his ex-wife opposed his emigration.<sup>7</sup> His ex-wife's consent was required by the Ukrainian government before Yuri could leave the country.<sup>8</sup> The only way he was able to leave the Ukraine and enter the United States was on a B visa.<sup>9</sup> When Yuri's visa expired, deportation proceedings by the U.S. Immigration and Naturalization Service (INS) were initiated against him.<sup>10</sup> According to the immigration judge and the Board of Immigration Appeals (BIA), Yuri had not established eligibility for asylum in the United States or the withholding of deportation to the Ukraine.<sup>11</sup> Despite the fact that Yuri used the same well-founded

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1. See Brief for Petitioner at 6, *G.Y. v. INS*, No. 99-1443 (7th Cir. filed Apr. 7, 1999) (on file with the *Journal of Legislation*) (the petitioner's name has been changed to protect his privacy).

2. See *id.* at 4.

3. See *id.* at 5.

4. See *id.* at 4.

5. See Foreign Operations, Export Financing, and Related Program Appropriations Act of 1990, Pub. L. No. 101-167, § 599D(a), 103 Stat. 1195, 1261-62 (1989) (codified as amended at 8 U.S.C. § 1157 (1994 & Supp. IV, 1998)) [hereinafter *Lautenberg Amendment*].

6. See *id.*

7. See Brief for Petitioner, *G.Y. v. INS* at 4, (No. 99-1443).

8. See *id.*

9. See *id.*

10. See *id.*

11. See *id.* at 4-5.

claim of religious persecution that applied to his mother, sister, and her family, Yuri was about to be deported whereas his other family members were granted refugee status and then permanent resident status. What was the distinction between Yuri's INS application for residency and the applications of his other family members, which led to this radically different treatment? The essential elements of religious persecution were well documented and present in all of the petitions for legitimate status in the U.S. However, Yuri filed his petition within the U.S., whereas his other immediate family members filed their applications outside of the U.S. Yuri was an asylum applicant. His mother, sister and her family were refugees. The entire family unit had suffered discrimination and harassment in their home country, but the INS wanted to deport Yuri and provide his other family members with permanent resident status. Unfortunately for Yuri, and despite the merits of his request for asylum, the Lautenberg Amendment has been interpreted by some courts to apply only to refugees and not to asylum applicants.

Should the Lautenberg Amendment, which courts hold govern the adjudication of certain overseas refugee applications made under section 207 of the Immigration and Nationality Act (INA),<sup>12</sup> also be interpreted to govern the adjudication of asylum applications made under INA section 208<sup>13</sup>? If the required elements of religious persecution exist in the applicant's home country, then yes, the Lautenberg Amendment *should* cover both refugee and asylee applications. There are several reasons why section 207 should be included in the Lautenberg Amendment.

Part I will provide some background information on the refugee and asylum application process, the differences and similarities between these two types of applications, and the creation of special preference categories for certain aliens, such as the Lautenberg Amendment. Usually, special amendments to immigration law of this nature provide certain categories of aliens with a lesser adjudication standard for proof of persecution compared to aliens who do not fall within this special category. In Part II, several reasons will be given as to why the Lautenberg Amendment should be applied equally to both refugees and asylees: First, under the Refugee Act of 1980,<sup>14</sup> section 207 (refugees) and 208 (asylees) share the same substantive standard of "refugee," i.e., by definition, asylees are also refugees; therefore, the Lautenberg Amendment should apply to both refugees and asylees. Second, treating section 207 and 208 as integral with each other promotes judicial economy. Third, an argument could be made that section 208 was left out of the Amendment merely due to an oversight. In 1989 when the bill passed, Congress omitted any reference to asylees because Soviet citizens did not have the freedom or ability to travel to the U.S. that they do now. This essay will also examine various cases to demonstrate that aliens, who submit applications under section 207 and 208 and who flee from persecution in their home states, are being treated differently due to unintended language contained within the Lautenberg Amendment, and this unwarranted situation is causing a serious miscarriage of justice. In conclusion, the Lautenberg Amendment must be amended to include Section 208 that would provide relief to another category of refugee, the asylee from those countries Congress designates in need

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12. INA § 207, 8 U.S.C. § 1157 (1994 & Supp. IV 1998).

13. INA § 208, 8 U.S.C. § 1158 (1994 & Supp. IV 1998).

14. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

of special consideration. The Amendment should govern the adjudication of asylum applications as well as refugee applications.

## II. REFUGEE AND ASYLEE PROCEDURES

### A. Refugee

According to many immigration scholars, the Refugee Act of 1980 was “the first fundamental reform of the laws on admission and resettlement of refugees since 1952.”<sup>15</sup> The purpose of the Refugee Act was to “respond to the urgent needs of persons subject to persecution in their homelands. . . .”<sup>16</sup> The objectives of the Refugee Act were to provide a “systematic procedure for the admission” of refugees and a comprehensive and uniform procedure for the “effective resettlement and absorption” of refugees in the United States.<sup>17</sup> Under the Refugee Act, Congress and the executive branch cooperated to produce a new refugee definition<sup>18</sup> and an admissions system that would allow both flexibility and usable standards through systematic consultations between Congress and the executive branch.<sup>19</sup> To qualify for admission into the United States as a refugee, an applicant must first meet the minimum statutory definition of “refugee.” The new refugee definition is defined in INA § 101(A)(42) as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, 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>20</sup>

Refugee status under this standard is determined on the basis of an individualized persecution claim. The Board of Immigration Appeals (BIA) and various courts have stated that for the action to amount to persecution, the persecution must be “on account of” one of the five enumerated grounds listed in the statutory definition of a refugee: race, religion, nationality, social group or political opinion.<sup>21</sup> However, there are several conflicts and lack of uniformity in decisions regarding the persecution issue.<sup>22</sup> Also, the precise meaning of the term “well-founded fear” has been the subject of much debate and litigation, and it is the central issue in most political asylum and refugee applications.<sup>23</sup> Section 207 of the Immigration and Nationality Act of 1952 (INA) permits the

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15. Tahl Tyson, *The Refugee Act of 1980: Suggested Reforms in the Overseas Refugee Program to Safeguard Humanitarian Concerns from Competing Interests*, 65 WASH. L. REV. 921, 922 (1990) (citation omitted).

16. Refugee Act of 1980, *supra* note 14.

17. *Id.*

18. See 8 U.S.C. § 1101(a)(42) (1994 & Supp. IV 1998).

19. See 8 U.S.C. § 1157(e) (1994).

20. 8 U.S.C. § 1101(a)(42) (1994 & Supp. IV 1998).

21. See 8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. IV 1998).

22. See Bernard P. Wolfsdorf, *Permanent Immigration Through Political Asylum and Refugee Status*, C505 A.L.I.-A.B.A. 317, 327 (1990).

23. See *id.* at 323.

entry of aliens who meet the definition of "refugee" encompassed in section 101(a)(42).<sup>24</sup> The INA calls for the President, after congressional consultation, to designate the number of refugees who will be admitted each year.<sup>25</sup> Those numbers are then divided among geographical areas of the world, based on a standard of "special humanitarian concern" to the United States.<sup>26</sup>

## B. Asylum

Asylees are distinguished from refugees only in that they are already in the United States when they apply for asylum due to the persecution they would suffer if they were to return to their native country. They too must meet the definition of "refugee" as set out in § 101(a)(42). The Refugee Act of 1980 also established a new statutory procedure for granting asylum to refugees.<sup>27</sup> The 1980 Act added § 208 to the INA, which reads in relevant part:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.<sup>28</sup>

As stated in the 1994 version of 8 U.S.C. § 1158(a), "... the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title."<sup>29</sup> Hence, section 208 is section 207's parallel provision. This section allows aliens already in the United States to apply for political asylum, if they also meet the definition of "refugee" contained in INA § 101(A)(42), which has been defined above in the refugee discussion.<sup>30</sup> Section 209 of the INA applies to both § 207 refugees and § 208 asylees: after one year, a limited number of persons granted asylum or refugee status can adjust to permanent resident status.<sup>31</sup> "The purpose of section 209 was to place refugees and asylees on the same footing in terms of admission and adjustment of status."<sup>32</sup> Since sections 207, 208, and 209 appear to have an interdependent structure, the organization of these statutes contemplates "the uniform treatment of refugees and asylees."<sup>33</sup>

## C. Special Category Aliens

Since 1989, legislators have pushed the Immigration and Naturalization Service (INS)

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24. See INA § 207, 8 U.S.C. § 1157 (1994 & Supp. IV 1998).

25. See INA § 207(a)(2).

26. See House Report on the Refugee Act of 1979, H.R. REP. NO. 96-608 at 13.

27. See Refugee Act of 1980, *supra* note 14.

28. 8 U.S.C. § 1158(a)(1) (1994 & Supp. IV 1998).

29. 8 U.S.C. § 1158(a) (1994).

30. See *id.*

31. See INA § 209(a-b), 8 U.S.C. § 1159(b) (1994).

32. In the Matter of Karina Saamova-Soyfer, No. A-29-757-816 at 13 (EOIR May 9, 1995) (on file with the *Journal of Legislation*).

33. Brief for Petitioner, *G.Y. v. INS*, No. 99-1443 at 25.

for increased admissions of specific religious and ethnic groups, in particular Soviet Jews and Evangelicals, Czechs, and Poles. In doing so, they have created special preference categories for specific aliens.<sup>34</sup> In May of 1989, U.S. Senator Frank Lautenberg (D-NJ) proposed that Congress create a "rebuttable presumption of refugee status for Soviet Jews, Evangelical Christians and certain Southeast Asian nationals."<sup>35</sup>

Historically, the INS acted under the presumption that these groups had a well-founded fear of persecution. However, "[i]n the fall of 1988 the INS began denying the refugee applications of certain members of these groups on the ground that they did not have a well-founded fear of persecution."<sup>36</sup> The INS's actions provided the stimulus for Senator Lautenberg's bill. Senator Lautenberg argued that "since conditions for the historically persecuted groups in this bill [the Lautenberg Amendment] have not improved, nor has the INS shown an ability to fairly interview refugee applicants . . . , this bill is desperately needed as an interim measure."<sup>37</sup> The bill proposed by Lautenberg was also a reaction to the Soviet inability to protect certain categories of its nationals in the wake of *perestroika* and *glasnost*.<sup>38</sup>

The Lautenberg Amendment required the Executive branch to establish:

one or more categories of aliens who are or were nationals and residents of the Soviet Union and who share common characteristics that identify them as targets of persecution in the Soviet Union on account of race, religion, nationality, membership in a particular social group, or political opinion . . . . [One such category shall include] aliens who are . . . nationals . . . of the Soviet Union and who are Jews or Evangelical Christians.<sup>39</sup>

The Bill was written to assist the above category of aliens for the "purposes of admission as a refugee under section 207 of the Immigration and Nationality Act."<sup>40</sup> Despite the apparent intent of the bill, the Lautenberg Amendment failed to address the identical category of aliens who fell under section 208.

President Bush signed the Lautenberg Amendment on November 21, 1989.<sup>41</sup> The Amendment allows for a reduced admission standard for the particular groups and requires the eligible aliens to assert a fear of persecution and show a "credible basis for concern about the possibility of such persecution."<sup>42</sup> Senator Lautenberg explained that "[o]nce a refugee applicant proves he or she falls within one of these categories, the amendment lessens the evidence that he or she must present to prove the persecution . . . qualifying him or her for admission to the United States as a refugee."<sup>43</sup> The Congress' desire to continue to provide a haven for these groups of refugees is also demonstrated by the fact that the Amendment has been renewed several times since its promulgation

34. See 66 Interpreter Releases 397-98 (1989).

35. *Saamova-Soyfer*, No. A-29-757-816, at 19.

36. *Id.*

37. 135 CONG. REC. S4619 (daily ed. May 2, 1989) (statement of Sen. Lautenberg).

38. See THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 723-27 (2d ed. 1991).

39. *Lautenberg Amendment*, *supra* note 5, Pub. L. No. 101-167, § 599D(b)(1)(A), (b)(2)(A), 103 Stat. 1195, 1265 (1989).

40. § 599D(a), 103 Stat. 1261-62.

41. See 66 Interpreter Releases 1318 (1989).

42. *Lautenberg Amendment*, *supra* note 5, § 599D(a), 103 Stat. at 1262.

43. 135 CONG. REC. S11523 (daily ed. Sept. 20, 1989) (statement of Sen. Lautenberg).

in 1989.<sup>44</sup> "The purpose of the Lautenberg Amendment was and is to continue the United States['] policy of welcoming Soviet Jews and other category aliens and to insure that changes in INS policy would not affect our commitment to them."<sup>45</sup>

Some scholars have criticized that the Lautenberg Amendment, which establishes a presumption of eligibility for certain groups, is a "return to national origins discrimination."<sup>46</sup> In the past, the United States refugee policy was, at times, defined by special interests and foreign policy concerns, rather than on humanitarian concerns for the plight of all refugees.<sup>47</sup> This led to a discriminatory policy based on national origins.<sup>48</sup> The current Lautenberg Amendment "sets the precedent that admissions numbers and resettlement assistance funds will go to those with the strongest political constituency in the United States, rather than to those most in danger of persecution."<sup>49</sup>

However, others have argued that "Congress could alleviate much of the evidentiary uncertainties facing an applicant [refugee], while at the same time, lightening the asylum caseload that the INS faces by refining 8 C.F.R. §§ 208.13(b)(2)(i)(A),(B) to resemble the Lautenberg Amendment."<sup>50</sup> A rewritten statute with these refinements would make "for very consistent and predictable determinations if there was a consensus about which groups are entitled to category alien classification."<sup>51</sup> The goal of converting current refugee regulations into something that resembles the Lautenberg Amendment would allow more aliens to be placed into a general category so that "the INS could dispose of these cases more quickly," and as a result, "the adjudicators will have more time to devote to individual cases."<sup>52</sup> This would help alleviate the backlog of refugee and asylee cases and thereby shorten the application process. The more time judges and INS officials have to devote to individual cases, the greater the likelihood that their decisions will be consistent, fair and equitable.<sup>53</sup> "Such an approach would also eliminate much of the dispute as to the required nexus between the persecution and the grounds for that persecution."<sup>54</sup> Category aliens, such as those covered under the Lautenberg Amendment, are already presumed to have a well-founded fear of persecution "on account of" one of the statutorily required grounds.<sup>55</sup> If more aliens from different countries were accorded category alien status, this would "lessen the amount of refugees left who

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44. See Pub. L. 105-277, div. A, § 101(f), Oct. 21, 1998, 112 Stat. 2681-337, 2681-389; Pub. L. 105-118, Title V, § 574(1), Nov. 26, 1997, 111 Stat. 2432; Pub. L. 104-319, Title I, § 101(1), Oct. 19, 1996, 110 Stat. 3865; Pub. L. 104-208, div. A, Title I, § 101(c), Sept. 30, 1996, 110 Stat. 3009-121, 3009-168; Pub. L. 103-236, Title V, § 512(1), Apr. 30, 1994, 108 Stat. 466; Pub. L. 102-511, Title IX, § 905(a), (b)(1), (c), Oct. 24, 1992, 106 Stat. 3356; Pub. L. 102-391, Title V, § 582(a)(1), (b)(1), (c), Oct. 6, 1992, 106 Stat. 1686; Pub. L. 101-513, Title V, § 598(a), Nov. 5, 1990, 104 Stat. 2063.

45. *Saamova-Soyfer*, No. A-29-757-816, at 22.

46. Tyson, *supra* note 15, at 935.

47. See *id.* at 922.

48. See *id.* at 926-27.

49. *Id.* at 935.

50. Joseph J. Rose, Note, *The Asylum Seeker: The Proverbial Rat in the Evidentiary Maze of Asylum Law? Some Suggestions for Reform*, 24 Sw. U. L. REV. 473, 495 (1995).

51. *Id.*

52. *Id.* at 496.

53. See *id.*

54. *Id.*

55. See 8 U.S.C. § 1158 (1994 & Supp. IV 1998).

would have to go through the bureaucratic process of meeting the "on account of" requirement and ultimately lighten the amount of potential litigation in the administrative courts."<sup>56</sup>

Hence, many points that make up the Lautenberg Amendment are efficient, effective, and may serve as a model for changing current INS guidelines in the future. However, there is one major flaw in the Amendment: the Amendment's provisions only extend to refugees and not to asylum applicants.<sup>57</sup>

### III. LAUTENBERG SHOULD BE APPLIED TO BOTH REFUGEE AND ASYLEE APPLICANTS

The Lautenberg Amendment applies "for purposes of admission as a refugee under section 207 of the Immigration and Nationality Act."<sup>58</sup> Therefore, one might imply that this statute has no direct effect on applications for asylum under section 208. On the other hand, one could imply that the Lautenberg Amendment does have a direct effect on applications for asylum because section 207 refers to both asylees and refugees. An asylee under section 208 must meet the definition of refugee in order to qualify for asylum.

Section 207, which applies to refugees, and section 208, which applies to asylees, are essentially addressing the same issue: a well-founded fear of persecution in their home countries. Therefore, both sections should apply equally under the Lautenberg Amendment because refugee eligibility under section 207 and asylum eligibility under section 208 are governed by the same substantive standards. The substantive standard for eligibility for asylum under section 208 is that the applicant be a "refugee" under the section 101(a)(42)(A) definition. It should be noted that section 101(a)(42)(A) provides a nearly identical standard for refugee admission in a case where the refugee is still within his or her home country. Hence, it would be inconsistent with the purpose and intent of the Lautenberg Amendment to differentiate between aliens who all share a well-founded fear of persecution in their home country but who apply for asylum as refugees either under section 207 or under section 208.

In addition, section 209 of the Immigration and Naturalization Act contemplates the uniform treatment of refugees and asylees in terms of admission and adjustment of status. Accordingly, the Lautenberg Amendment should be interpreted similar to section 209, if the person applying is a special category alien, and provide the same lower standard of proof for adjudication purposes for both sections 207 and 208, since both applications are governed by the same substantive standards. This is, of course, still contingent on the fact that the person applying is a special category alien.

The only difference between section 207 and 208 is that there is a numerical limitation placed on the yearly admission of refugees under section 207.<sup>59</sup> This difference does not change the substantive standard of "refugee" that both section 207 and 208 share.

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56. Rose, *supra* note 49, at 496.

57. See ALEINIKOFF & MARTIN, *supra* note 37, at 726.

58. *Supra* note 40.

59. See INA § 207(a)(2), 8 U.S.C. § 1157 (a)(2) (1994).

One immigration judge in Philadelphia, Judge John F. Gossart Jr., ruled on this issue and concluded that section 207 and 208 were similar if not indistinguishable under the Lautenberg Amendment:

[b]oth [sections] 207 and 208 rely on the definition of refugee contained in [section] 101(a)(42). The Lautenberg Amendment changes the standard of proof required for a showing of well founded fear within the definition of refugee as contained in 101(a)(42) for aliens who are in the specified categories. Therefore when an alien who is within one of the Lautenberg categories is seeking to prove a well-founded fear of persecution and trying to meet the definition of refugee as contained in 101(a)(42), for admission as an asylee under [section] 208, she may avail herself of the reduced Lautenberg standard.<sup>60</sup>

Yet, refugees and asylees have been treated differently under the Lautenberg Amendment depending on the applicability of section 207 and 208 to each individual case. In *Tsupylo v. INS*,<sup>61</sup> Tsupylo, a citizen of the Ukraine who entered the United States and sought asylum because she feared religious persecution if she were to return to the Ukraine, appealed to the Seventh Circuit Court of Appeals, claiming that the BIA failed to accord her a lower burden of proof pursuant to the Lautenberg Amendment.<sup>62</sup> The Seventh Circuit dismissed her appeal by determining that Tsupylo was not seeking admission, she was seeking asylum under 8 U.S.C. § 1158, hence, the Lautenberg Amendment "by its terms has no application to her situation."<sup>63</sup>

The Ninth Circuit in *Volosevych v. INS*<sup>64</sup> denied the Volosevych family's petition for review because they were applying for asylum under the provisions of section 208 of the Act, and the Lautenberg Amendment "is inapplicable to their petition."<sup>65</sup> The Volosevych family, natives and citizens of the Ukraine, contended that they had established a well-founded fear of future persecution on account of their Pentecostal religion.<sup>66</sup> However, due to the court's denial of their petition for review, they were not entitled to the lower evidentiary standard of the Lautenberg Amendment to establish a well-founded fear of persecution.<sup>67</sup>

Amending the statute to include section 208 would alleviate the problems asylees face when requesting political asylum under the Lautenberg Amendment. Also, treating section 207 and 208 the same under the Amendment would promote judicial economy. If section 208 were to be included under the Amendment, refugees already in this country under a nonimmigrant visa would be eligible to apply for asylum under the Amendment while they continue to reside in the United States, rather than return to their home countries where they would be required to remain until their refugee application could be adjudicated.

Why was section 208 not included in the Lautenberg Amendment? This statute,

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60. *Saamova-Soyfer*, No. A-29-757-816, at 26.

61. No. 98-3586, 1999 U.S. App. LEXIS 9761 (7th Cir. May 18, 1999).

62. *See id.* at \*1.

63. *Id.* at \*5.

64. No. 97-70764, 1998 U.S. App. LEXIS 31956 (9th Cir. Dec. 21, 1998).

65. *Id.* at \*4.

66. *See id.* at \*2.

67. *See id.* at \*4.

sometimes referred to as section 599D, was attached to an appropriations bill; it was a small part of the Foreign Operations, Export Financing, and Related Programs Appropriations Act. This statute was not carefully scrutinized before it was presented. Perhaps the exclusion of section 208 was merely an unintended oversight. Also, at the time the Amendment was passed in 1989, the Soviet Union did not allow many of its citizens to travel out of the country. Hence, Congress did not see a need to include section 208 asylees in this Amendment because there were few Soviets in this country at that time who were actively seeking asylum.

#### IV. CONCLUSION

In conclusion, the Lautenberg Amendment should be amended to include section 208, and therefore, govern the adjudication of asylum seekers as well as refugee applicants. The inclusion of section 208 would allow immigration judges to grant asylum under the Amendment to those who have already fled from persecution and are currently in the United States. Otherwise, these aliens would have to return to their home country, where they would face further persecution and possible additional obstacles as they reapply for asylum as refugees.

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