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PART V

DEPARTMENT OF LABOR

Employment and Training Administration

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TEMPORARY EMPLOYMENT OF ALIENS

Labor Certification Process

DEPARTMENT OF LABOR

Employment and Training Administration

[20 CFR Part 655]

TEMPORARY EMPLOYMENT OF ALIENS

Labor Certification Process for Temporary Agricultural and Logging Employment

Notice is hereby given that the Employment and Training Administration of the Department of Labor is proposing to amend its regulations governing the labor certification process for the temporary employment of aliens in the United States in agricultural (including sheepherding) and logging occupations. The regulations proposed in this document, when finalized, are intended to replace the current regulations at 20 CFR 602.10, 10a and 10b.

Interested persons are invited to submit comments on the proposed regulations to the Assistant Secretary for Employment and Training, Attention: William B. Lewis, Administrator, United States Employment Service, Room 8000, Patrick Henry Bldg., 601 D St., N.W., Washington, D.C. 20213, until February 24, 1977.

Among the proposed changes from the present regulations, are the following substantive changes: 1. The requirements governing sheepherding have been integrated with the requirements for other agricultural occupations.

2. The relationship between employers and their agents, such as associations of employers, have been set forth with greater clarity.

3. The period of recruitment of U.S. workers through the Federal-State employment service system has been lengthened from 60 to 90 days, or longer under certain conditions.

4. Provisions have been added governing fraud and willful misrepresentation with respect to temporary labor certifications and applications therefor.

5. A provision has been added that, if an employer has used foreign workers for each of the previous two years, the labor certification application must include a recruitment plan designed to reduce the employer's dependence on foreign workers.

6. The requirements involving deductions from workers' pay have been simplified.

7. The amount which an employer may charge a worker for providing the worker with three meals per day has been increased.

8. The provisions governing workers' disability insurance have been made clearer and more flexible.

9. The amount of work which an employer must guarantee to offer a worker has been increased from three-fourths of the workdays to at least 5 eight-hour days of work per week.

10. Provision is made for the publication of adverse effect piece rates at a later date.

11. The procedure, which was previously set forth in the Employment Security Manual, whereby, under certain conditions, an employer was permitted to pay less than the adverse effect rate to physically handicapped U.S. workers over 60 and under 18 years of age who could not produce normally, has been set forth in the regulations.

Accordingly, it is proposed to amend Title 20 of the Code of Federal Regulations, by adding a new Part 655 to read as follows:

PART 655—LABOR CERTIFICATION PROCESS FOR THE TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

Subpart A—Labor Certification Process for Temporary Agricultutral and Logging Employment

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AUTHORITY: 8 CFR 214.2(h)(3)(i); Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 et seq.

§ 655.1 Scope and purpose; definitions.

(a) Section 214.2(h)(3)(i) of the Immigration and Naturalization Service Regulations (8 CFR 214.2(h)(3)(i)), issued under the Immigration and Nationality Act, requires, in support of a petition for the admission of an alien into the United States to perform certain temporary labor:

> Either a certification from the Secretary of Labor or his designated representative stating that qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed, or a notice that such a certification cannot be made shall be attached to every non-immigrant visa petition to accord an alien a classification under Section 101(a)(15)(H)(ii) of the Act.

(b) The temporary labor certification procedure is designed to prevent the use of foreign labor at the expense of the wages and working conditions of United States workers similarly employed. Thus, temporary foreign workers may only be used to meet shortages which occur in a particular occupation or industry. In the long run, normal adjustments in wages and working conditions should bring sufficient United States workers to an occupation.

(c) The regulations in this subpart set forth the process by which temporary labor certifications may be applied for, and by which they may be granted or denied.

(d) *Definitions of terms used in this subpart.* For purposes of this subpart:

"Administrator" means the chief official of the United States Employment Service or the Adminstrator's designee.

"Adverse effect rate" means the wage rate which the Administrator has determined must be offered and paid to foreign and U.S. workers for a particular occupation and/or area so that the wages of similarly employed U.S. workers will not be adversely affected. The Administrator may determine that the prevailing wage rate in the area and/or occupation is the adverse effect rate, or that a wage rate other than the prevailing wage rate is the adverse effect rate.

"Area of intended employment" means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Standard Metropolitan Statistical Area (SMSA), any place within the SMSA is deemed to be within normal commuting distance of the place of intended employment.

"Employment and Training Administration (ETA)" means the agency within the Department of Labor (DOL) which includes the United States Employment Service (USES).

"Employer" means a person, firm, corporation or other organization which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized repersentative of such a person, firm, or corporation. For purposes of this definition an "authorized representative" means an employee of the employer whose position or legal status authorized the employee to act as the agent for the employer in labor certification matters. Neither the term "employer" nor "authorized representative" shall mean an association of employers which acts as the agent of a group of employers for temporary labor certification purposes.

"Job opportunity" means a job opening for employment at a place in the United States to which U.S. workers can be referred.

"Local employment service office" means an office of a State employment service agency which serves a particular geographic area within a State.

"*Notice of Findings*" means a notice which sets forth the bases upon which a Regional Administrator intends to deny a temporary labor certification unless the bases are satisfactorily rebutted.

"Regional Administrator, Employment and Training Administration (RA)" means the chief official of the Employment and Training Administration (ETA) in a Department of Labor (DOL) regional office.

"Secretary" means the Secretary of Labor, the chief official of the U.S. Department of Labor, or the Secretary's designee.

"Temporary labor certification" means the determination by the Secretary of Labor, pursuant to 8 CFR 214.2(h)(3)(i), that (1) there are not sufficient U.S. workers who are qualified and available to perform the work and (2) the employment of the alien will not adversely affect

the wages and working conditions of similarly employed U.S. workers.

"United States Employment Service (USES)" means the agency of the U.S. Department of Labor, established under the Wagner-Peyser Act of 1933, which is charged with administering the national system of public employment offices and carrying out the functions of the Secretary under the Immigration and Nationality Act.

"United States worker" means any worker who, whether U.S. citizen or alien, is legally permitted to work permanently within the United States.

§ 655.2 Temporary labor certification applications (general).

(a) An agricultural or logging employer anticipates a labor shortage may request a temporary labor certification for temporary foreign workers by filing, or by having an agent file, a temporary labor certification application, signed by the employer, with a local office of a State employment service in the area of intended employment. However, if the temporary labor certification application is filed by an agent, such as an association of employers, the agent may sign the application. If an agent is used, the application must be accompanied by a letter from each employer, signed by the employer, which authorizes the agent to act on the employer's behalf and which states that the employer assumes full responsibility for the accuracy of the application, for all representations made by the agent on the employer's behalf, and for the fulfillment of all legal requirements arising from the temporary labor certification.

(b) Every temporary labor certification application shall include: (1) A copy of the job offer used by the employer (or each employer in the recruitment efforts for both U.S. and foreign workers. The job offer for each employer shall state the number of workers needed by the employer, and shall be signed by the employer. The job offer shall comply with the requirements of § 655.3. If the State agency informs the employer that workers, who are fluent and/or literate in Spanish and who are not substantially fluent and/or literate in English, will be recruited for the job opportunities, a copy of the job offer written in Spanish shall be submitted;

(2) The assurances required by § 655.4 of this subpart;

(3) If applicable, the recruitment plan required by § 655.5; and

(4) Documentation showing the employer's efforts to recruit U.S. workers as required by § 655.6.

(c) A temporary labor certification application shall be filed in sufficient time to allow the local office to attempt to recruit U.S. workers through the Employment Service intrastate and interstate clearance systems for 90 calendar days, unless the RA has notified the employer in writing at least 30 days prior to the filing of the application that more than 90 days will be needed; the RA, however, shall never specify a period in excess of six months, and shall offer the employer assistance in recruiting U.S. workers. This 90-day period (or longer period if applicable) shall be in addition to the time necessary for the employer to secure foreign workers by the date of need if the temporary labor certification is granted. The Department of Labor, however, may grant or deny the temporary labor certification prior to the ending of the 90 calendar days (or longer period if applicable).

§ 6655.3 Contents of job offers.

(a) Each employer's job offer shall state that: (1) The employer will provide housing without charge which will meet either the full set of Department of Labor, Employment and Training Administration standards set forth at 20 CFR Part 620 or the full set of Department of Labor, Occupational Safety and Health Administration standards set forth at 20 CFR 1910.142;

(2) The employer, either on its own or in combination with other employers will provide housing to U.S. workers who are women and to those who need family housing;

(3) (i) If applicable, the worker will be eligible for workers' compensation for injury and disease arising out of and in the course of the worker's employment; or

(ii) If the worker will not be covered by the State workers' compensation law, the employer will provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment, and that the insurance will provide benefits at least equal to those provided under the State workers' compensation law;

(4) The employer will furnish, without cost to the worker, all tools, supplies and equipment required to perform the work including all necessary protective clothing and special footwear and that, if any of these items are provided by the worker, the employer will reimburse the worker for the cost;

(5) The employer will provide the worker with three meals a day, and shall state the cost to the worker for such meals. The cost shall not be more than $3.25 per day unless the RA has approved a higher cost pursuant to § 655.13.

(6) (i) The employer will provide or pay for the worker's transportation and daily subsistence from the worker's home or place of last employment, whichever is applicable, to the place of employment provided the worker works for 50 percent or more of the contract period, and that the amount of the daily subsistence payment will be at least as much as the amount the employer will charge the worker for three meals a day at the place of employment;

(ii) Whether the employer will advance payment to the worker for the costs of transportation and subsistence en route;

(7) If the worker completes the contract period, the employer will provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the employer recruited the worker (home or last place of employment, whichever is applicable) unless the worker has immediately subsequent employment with an employer who has contracted with the worker to pay for the worker's transportation and daily subsistence expenses to that employer's worksite.

(8) The employer will provide transportation between the worker's on-the-job site living quarters and the place where the work is to be performed without cost to the worker, and that all such transportation will be in accordance with all applicable laws and regulations.

(9) The employer, unless the prevailing practice in the area of intended employment is for the employer to pay for all travel time as work-time, will pay the worker the adverse effect rate (or the adverse effect rate's piece rate equivalent) for all travel time to work in excess of one-half hour and for all travel time from work in excess of one-half hour.

(10) (i) The employer guarantees the worker the opportunity to work for 5 eight-hour workdays out of each week, and that, if, under the guarantee or otherwise, the employer affords the worker employment on a day on which the worker refuses to work because of the worker's religious convictions, the employer will not dismiss the worker for not working on that day;

(ii) If the worker is afforded less employment than guaranteed, the worker will be paid an amount equal to the amount which the worker would have earned if the worker had worked for the guaranteed periods;

(iii) If the worker will be paid on a piece rate basis, the employer will use the worker's average hourly earnings to calculate the amount due under the guarantee; and

(iv) That any hours which the worker fails to work when the worker has been afforded the opportunity to do, and all hours of work performed, will be counted in calculating the period of guaranteed employment;

(11) (i) The employer will keep accurate and adequate records of all the worker's earnings and hours of employment, including records showing the nature of the work performed, the number of hours of work offered each day by the employer and worked each day by the worker, the time the worker began and ended each workday, the rate of pay, the amount of work performed, the worker's earnings, and the amount of and reasons for any and all deductions made from the worker's wages;

(ii) If the number of hours worked by the worker is less than the number offered, the records will state the reason therefor;

(iii) The records, including field tally records and supporting summary payroll records, will be made available for inspection and copying by representatives of the Secretary of Labor, and by the worker or the worker's representatives; and

(iv) The employer will retain the records for not less than three years after the completion of the contract;

(12) The employer will furnish to the worker at or before each pay-day, in one or more written statements:

(i) The worker's total earnings for the pay period, broken out by straight-time and overtime;

(ii) The worker's hourly rate or piece rate of pay;

(iii) The hours of employment which have been offered to the worker;

(iv) The hours worked by the worker;

(v) An itemization of all deductions made from the worker's wages; and

(vi) If piece rates are used, the units produced daily;

(13) The employer will comply with all applicable Federal, State and local laws, including employment-related safety and health laws;

(14) (i) If the worker will be paid by the hour, the employer will pay the worker the adverse effect rate; or

(ii) If the worker will be paid on a piece rate basis, the piece rate will be based on the normal efforts of average U.S. workers and will be designed to produce average hourly earnings at least equal to the adverse effect rate, and that, if the piece rate does not result in average hourly earnings at least equal to the adverse effect rate, the worker's pay at each pay period will be supplemented so that the worker's earnings are at least as much as the worker would have earned if the worker had been paid the adverse effect rate;

(15) The frequency with which the worker will be paid (in accordance with the prevailing practice in the area of intended employment, or at least biweekly whichever is more frequent);

(16) If the worker abandons employment before the end of the contract period, or is terminated for cause, the employer will not be responsible for providing or paying for the subsequent transportation of the worker;

(17) (i) If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to a fire or other Act of God which makes the fulfillment of the contract impossible, the employer may terminate the work contract;

(ii) The employer will make efforts to transfer the worker to other comparable employment. If such transfer is not effected, the worker will be returned home or to the worker's last place of employment, whichever is applicable, at the employer's expense; and that

(iii) Any deductions made from the worker's pay by the employer for transportation and subsistence to the place of employment will be refunded to the worker.

(18) The employer will make those deductions from the worker's paycheck which are required by law:

(b) The job offer shall specify all deductions, not required by law, which the employer will make from the worker's paycheck. All deductions shall be reasonable. If the employer intends to deduct the cost of the worker's transportation and daily subsistence to the place of employment, the job offer shall state that the worker will be fully reimbursed for such deductions upon the worker's completion of 50 percent of the worker's contract period.

(c) The job offer shall also contain all the provisions contained in any contract which the employer agreed to in the previous year which conferred benefit upon foreign workers additional to those set forth in paragraphs (a)(1) through (a)(18) and (b) of this section.

(d)(1) The job offer may also contain a provision that physically handicapped U.S. workers over 60 years of age and/or under 18 years of age who are unable to produce normally may be requested or required by the employer to sign written waivers indicating their inability to work with normal speed or effectiveness, that such workers will not receive the piece rate earnings guarantee and that, if they are employed at hourly rates, they will be paid rates as low as 75 percent of the required adverse effect rate, but not less than the applicable Federal or State minimum wage.

(2) If the provision in paragraph (d)(1) of this section is included:

(i) The job offer must also contain provisions that the employer may request a U.S. worker to sign a waiver only after the worker has had average hourly earnings below the hourly standard for no less than 40 hours of work experience at piece rates designed to produce the hourly guarantee; that the 40 hour trial work experience period may begin only after the worker has had 24 hours of training in the activity in question; that the employer will maintain records to demonstrate the worker's earning ability during the 24 hours of training and during the 40 hour trial work experience period; and that, during this 64 hour period, the worker will receive the full hourly adverse effect rate;

(ii) The waiver shall be worded as follows:

I _____ having been given 3 eight
(Employee)
hour days of training and 40 hours work experience as a _____ and being unable to maintain production standards of _____ _____ here-
(Occupation) (Minimum) (Acceptable per hour or day)
by waive my right to the minimum required rate of $_____ and authorize my employer to reduce my minimum wage to $_____
(List rate)
(No less than 75 percent of adverse effect rate. (In no case less than the applicable minimum Federal or State wage).)

§ 655.4 Assurances.

As part of the labor certification application the employer shall include assurances signed by the employer, that:

(a) The employer has not within the past year been found by a Court or by a Federal or State enforcement agency to have failed without good cause to comply with an employment contract with a United States or foreign agricultural or logging worker, or to have failed without good cause to comply with applicable Federal, State and local employment-related laws, including health and housing laws and temporary labor certification related requirements, or that, if the employer was so found, the employer has produced conclusive, documented evidence that the violation has been remedied, and assures that it will not violate the law or laws in the future;

(b) The job opportunity is not:

(1) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute, or

(2) At issue in a labor dispute;

(c) During the period in which foreign workers are scheduled to be employed under the terms of the temporary labor certification:

(1) The wages and working conditions which will be offered and afforded by the employer to any foreign worker will not be higher or more favorable than those offered and afforded to U.S. workers;

(2) The employer will offer and provide employment to any U.S. worker who is qualified and willing to work in the job opportunity (including women) and will offer and provide housing to such a worker and to the worker's family until the time the foreign worker who holds the job opportunity has completed 50 percent of the foreign worker's contract period; and

(3) The employer will provide each U.S. worker with a copy of the worker's employment contract. The employment contract which is provided to the worker shall be written in Spanish if the worker is fluent and/or literate in Spanish but is not substantially literate in English.

§ 655.5 Recruitment plan.

If the employer has made requests for temporary foreign labor for each of the preceding two years, the employer shall submit as part of the temporary labor certification application, a written plan for recruiting and retaining U.S. workers which is designed to reduce the use of temporary foreign workers. If such a recruitment plan was submitted in the previous year, the employer shall submit documents showing the employer's efforts to implement the plan and the results of the implementation.

§ 655.6 Recruitment efforts.

As part of the temporary labor certification application the employer shall include documents clearly showing the employer's efforts to recruit U. S. workers. The documents must show that:

(a) Reasonable efforts have been and will continue to be made by the employer to obtain U.S. workers at wage rates and working conditions no less favorable than those offered to aliens; and

(b) Such efforts included reasonable attempts to use workers who commute on a daily basis between their residences and the place of employment, the use of the Employment Service intrastate and interstate clearance system, and the employer's participation in special youth recruitment programs.

§ 655.7 Action on temporary labor certification applications by the local office.

(a) When a temporary labor certification application is filed with a local employment service office, the local office shall make sure that the application is complete. If the application is not complete, the local office shall return it to

the employer and shall advise the employer to re-file it when it is completed.

(b) If the application is complete, the local office, using the information on the application, shall prepare and process an employment service job order. If this job order is discriminatory or otherwise unacceptable as a job order under employment service regulations, the local office shall, as appropriate, either contact the employer to try to remedy the defect or return the application to the employer with instuctions as to how the defect can be remedied.

(c) (1) If the job order is complete, and if it complies with employment service regulations, the State agency shall use the job order to recruit U. S. workers from the local area and through the Employment Service intrastate and interstate clearance systems.

(2) In view of the statutorily established basic function of the employment service as a no-fee labor exchange, that is, as a forum for bringing together employers and job seekers, neither the Department of Labor nor the State employment service agencies are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. Nor do such job orders represent an "offer to contract" to which the Employment Service is in any way a party. Nevertheless, if the Department of Labor or a State employment service agency finds probable cause to believe that an employer's job order contains a material representation, the procedures at Subpart F of Part 658 of this Chapter shall be followed (as proposed in the FEDERAL REGISTER on October 5, 1976, at 41 FR 44023).

(d) The State agency shall send the labor certification application to the appropriate Regional Administrator (RA), Employment and Training Administration, together with a statement indicating whether the local office believes the employer has met requirements of this subpart, a report of U.S. worker availability in the area, a description of the recruitment efforts undertaken by the local office on behalf of the employer, and any other information requested by the ETA.

§ 655.8 Temporary labor certification determinations.

(a) The RA shall determine whether the employer has met the requirements of §§ 655.2–655.6. If the RA finds that the employer has complied with those requirements, the RA shall recommend to the Administrator in writing that the temporary labor certification be granted, giving the reasons therefor. If the Administrator objects to the granting of the temporary labor certification based on relevant considerations, the RA shall not grant the temporary labor certification until and unless the objections are resolved.

(b) If the RA believes that the employer's efforts to recruit U.S. workers has not been sufficient or that the temporary labor certification should not be granted for other reasons, the RA shall issue a Notice of Findings, as defined in § 655.1, and shall afford the employer a reasonable time to submit evidence to rebut the bases of the Notice of Findings.

(c) No labor certification shall be granted to any employer if the Immigration and Naturalization Service has notified the Department of Labor that the employer has knowingly had in his employ during the previous 12 months any foreign worker who was not lawfully in the United States, or if the employer, in the previous 12 months, has been found to have violated the Farm Labor Contractor Registration Act or the Federal regulations issued under that Act.

(d) After the labor certification determination has been made the RA shall notify the employer in writing of the decision. If the labor certification is denied, the notice shall state the reasons therefor and the appeal rights of the employer under the Immigration and Naturalization Service regulations.

§ 655.9 Adverse effect rates.

(a) *Schedule of Rates for 1976.*

State:	Rate
Connecticut	2.61
Florida (sugarcane only)	3.04
Maine	2.69
Maryland	2.27
Massachusetts	2.56
New Hampshire	2.82
New York	2.48
Vermont	2.78
Virginia	2.44
West Virginia	2.74

(b) The adverse effect rate for all areas not listed in paragraph (a) of this section, for logging and sheepherding, and for Florida crops other than sugarcane, shall be the prevailing wage rate for the occupation in the area of intended employment.

(c) The Administrator shall review the adverse effect rates annually in the light of changed agricultural and/or similarly skilled non-agricultural wage rates in each State. The Administrator shall periodically publish a schedule containing: (1) The adverse effect rate; and (2) The normal piece-rate production of an average U.S. worker; (3) The adverse effect piece rate, that is, the piece rate by which an average U.S. worker will earn the adverse effect rate.

§ 655.10 Temporary labor certification applications involving fraud or willful misrepresentation.

(a) If possible fraud or willful misrepresentation involving a temporary labor certification application is discovered prior to a final temporary labor certification determination, or if it is learned that an application is the subject of a criminal indictment or information filed in a Court, the RA shall refer the matter to the INS for investigation and shall notify the applicant in writing of this referral. The RA shall continue to process the application and may issue a qualified temporary labor certification.

(b) If a Court finds an applicant innocent of fraud or willful misrepresentation, or if the Department of Justice decides not to prosecute an applicant, the RA shall not deny the temporary labor certification application on the grounds of fraud or willful misrepresentation. The application, of course, may be denied for other reasons pursuant to this subpart.

(c) If a Court or the INS determines that there was fraud or willful misrepresentation involving a temporary labor certification application, the application shall be deemed invalidated, processing shall be terminated, and the application shall be returned to the applicant with with the reason therefore stated in writing.

§ 655.11 Invalidation of temporary labor certifications.

After issuance, temporary labor certifications are subject to invalidation by the INS upon a determination, made in accordance with that agency's procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the temporary labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify the INS in writing.

§ 655.12 Failure of employers to comply with the regulations under this subpart.

If the Department of Labor or a State employment service agency has probable cause to believe that an employer's job order contains a material misrepresentation, or that an employer has not complied with the terms of a temporary labor certification application or of a certification, the procedures at subpart F of Part 658 of this Chapter shall be followed (as proposed in the FEDERAL REGISTER on October 5, 1976 at 41 FR 44023).

§ 655.13 Petitions for higher meal charges.

(a) An RA may permit an employer to charge workers up to $4.00 for providing them with 3 meals per day if the employer justifies the charge by submitting documentary evidence to the RA.

(b) Evidence submitted shall include the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served and the number of days meals were provided. The cost of the following items may be included: food; kitchen supplies other than food, such as lunch bags and soap; labor costs which have a direct relation to food service operations, such as wages of cooks and restaurant supervisors; fuel, water, electricity, and other utilities used for the food service operations; other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for the representative pay period shall be available for inspection by the Secretary's representatives for a period of 1 year.

Signed at Washington, D.C., this 14th day of January 1977.

WILLIAM H. KOLBERG,
Assistant Secretary for Employment and Training.

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