

**UNITED STATES OF AMERICA
INS NEW YORK ASYLUM OFFICE**

-----X
**IN RE MR. X'S ASYLUM
APPLICATION**

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Alien No. XXX

**MEMORANDUM OF LAW IN SUPPORT
OF THE APPLICATION FOR ASYLUM OF MR. X**

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PRELIMINARY STATEMENT

Mr. X is a Tibetan national who fled Tibet because he was persecuted and fears future persecution by Chinese authorities on account of his Buddhist religion, membership in the particular social group of Tibetan Buddhist monks, Tibetan nationality, and pro-Tibetan independence political opinions. He submits his application for asylum on the basis of such past persecution and fear of future persecution.

Mr. X is a Tibetan Buddhist monk of the Gelupga sect, the same sect to which the Dalai Lama belongs. While in Tibet, Mr. X participated in activities in which he expressed his support for the independence of Tibet and the return of the Dalai Lama to Tibet. Because of his participation in such activities, Chinese authorities in Tibet harassed, arrested and detained Mr. X on numerous occasions. On one of these occasions, Mr. X was arrested for hanging posters that expressed pro-Tibetan independence statements such as “Free Tibet” and “Dalai Lama should return.” He was detained for over two years and beaten severely on a regular basis.

Upon his release after two years of imprisonment, Chinese authorities remained suspicious of his pro-Tibetan opinions and sympathies toward the Dalai Lama, and they continued to harass Mr. X. The authorities warned him that if they caught him again participating in banned activities, he would be re-arrested and sentenced to life imprisonment.

In December 1998, Chinese authorities entered Mr. X’s home unannounced and searched it thoroughly. They confiscated some Buddhist texts and told Mr. X to report to the police station on or about January 12, 1999. Fearing re-arrest and life imprisonment if he were to report as directed, Mr. X decided to flee Tibet. He now seeks a grant of asylum from the United States.

FACTUAL BACKGROUND

I. COUNTRY CONDITIONS

A. China’s Rule of Tibet Has Been Characterized by Human Rights Abuses and Persecution of the Tibetan People

1. History of Chinese Rule and Human Rights Abuses in Tibet

The Chinese People’s Liberation Army invaded Tibet in 1949, commencing an era of violent suppression that continues today. Since the invasion, China has continuously committed egregious violations of fundamental human rights in its attempts to force Tibet into assimilating with China. In the words of the U.S. Department of State:

The government [has] continued to commit widespread and well-documented human rights abuses, in violation of internationally accepted norms stemming from the authorities’ very limited tolerance of public dissent, fear of unrest, and the limited scope or inadequate implementation of laws protecting basic freedoms. The Constitution and laws provide for fundamental human rights, but they are often ignored in practice. Abuses include torture and

mistreatment of prisoners, forced confessions, and arbitrary arrest and lengthy incommunicado detention.¹

In 1959, China banned the administration of the Dalai Lama, Tibet's political and spiritual leader, and forced the Dalai Lama to flee to India. He established the Tibetan government-in-exile in Dharamsala, India, and has lived there since, working to free Tibet by peaceful means. Many Tibetans forcibly resisted the Chinese occupation and expulsion of the Dalai Lama. The Chinese military brutally crushed this modest resistance, and subjected the participants to severe human rights abuses.

In 1960, the International Commission of Jurists declared that the Chinese government had committed genocide in Tibet in an attempt to destroy the Tibetan people as a religious group.² The Commission stated that China had systematically killed Tibetan religious leaders, relocated Tibetan children in China, coerced Tibetans into compelled labor, and forcibly indoctrinated them with socialist thought.³

China's systematic persecution of Tibetans led many to flee their homeland. Nearly one million Tibetans attempted to leave Tibet immediately following the 1959 exile of the Dalai Lama.⁴ Due to the extreme difficulty of crossing the Himalayas and the watchfulness of Chinese soldiers, however, only 10,000 Tibetans survived the trip to join the Dalai Lama in Dharamsala.⁵

During the Cultural Revolution of the 1960s, China augmented its repression of Tibet, attempting to eliminate political and religious freedom and resistance to Chinese rule. In so doing, China killed thousands of Tibetans.⁶ China made special efforts to eliminate the practice of Buddhism in Tibet, destroying thousands of the monasteries that were the traditional centers of Tibetan religion and education.⁷

¹ U.S. Department of State, *China Country Report on Human Rights Practices for 1997* at 713 (hereinafter "1997 Country Report"). Copies of all secondary sources will be made available upon request.

² International Commission of Jurists, *Tibet and the Chinese People's Republic – A Report to the International Commission of Jurists by its Legal Inquiry Committee on Tibet* (1960), at 3.

³ *Id.* at 13-14, 23.

⁴ Maura Moynihan, *Genocide in Tibet*, *The Washington Post*, Jan. 25, 1998.

⁵ *Id.*

⁶ See A. Tom Grunfeld, *The Making of Modern Tibet* (1996), at 185.

⁷ *Id.* at 172.

2. Chinese Persecution of Tibetans During Mr. X's Lifetime

(a) *The Crackdown in the Late 1980s*

In the late 1980s, the Chinese government ended a ten-year period of relative tolerance and peace and began to adopt a more repressive policy in Tibet. Essentially, the authorities embarked upon a campaign to crush all vestiges of Tibetan nationality, religion and culture. In September 1987, Tibetans demonstrated peacefully in Lhasa to support the Dalai Lama and protest the recent execution of two Tibetans. In response, Chinese police attacked the protestors using tear gas and electric cattle prods. Many of the demonstrators were imprisoned and tortured. Subsequently, the government imposed martial law in Tibet and temporarily banned foreign tourists.⁸

(b) *Persecution in the Years Immediately Preceding Mr. X's Flight*

In 1994, China passed a law banning all pictures of the Dalai Lama in an attempt to undermine his popularity among Tibetans. Thus, many Tibetans like Mr. X began to be persecuted for mere possession of pictures of the Dalai Lama or religious texts supporting the Dalai Lama.⁹ In other words, China has targeted not only religious and political activists, but all Tibetans who wish for political and religious freedom.

In 1996, human rights conditions in Tibet worsened. According to the 1996 State Department Country Report for Human Rights Practices:

Chinese government authorities continued to commit widespread human rights abuses in Tibet, including instances of death in detention, torture, arbitrary arrest, detention without public trial, [and] long detention of Tibetan nationalists for expressing their religious and political views, and intensified controls on religion and on freedom of speech and the press, particularly for ethnic Tibetans.¹⁰

In 1997, China continued human rights violations as a matter of course. Amnesty International reported that “hundreds, possibly thousands, of protesters and suspected opponents of the government were detained during the year, while thousands of political prisoners detained in previous years remained imprisoned . . . Torture and ill-treatment remained widespread.”¹¹

⁸ See *id.* at 233-235.

⁹ U.S. Department of State, *China Country Report on Human Rights Practices for 1994* (hereinafter “1994 Country Report”).

¹⁰ U.S. Department of State, *China Country Report on Human Rights Practices for 1996* (hereinafter “1996 Country Report”).

¹¹ See Amnesty International, *Amnesty International Report 1998*.

Chinese authorities continued to announce verdicts and sentences in political trials before the trials even started, and appeals remained a meaningless formality. Torture and ill treatment in detention centers, prisons and labor camps remained common, while those who committed those acts were rarely held accountable. Between January and July of 1997, 300 to 400 cases of torture and ill treatment were investigated – the real frequency of torture is believed to be far higher – but few actual prosecutions for torture were reported.¹²

Both the 1998 and 1997 State Department reports note that “individuals accused of political activism faced serious persecution during the year, as the Government proceeded with its . . . campaign [under the slogan “Buddhism must conform to Socialism and not Socialism to Buddhism] to discredit the Dalai Lama as a religious leader and limit the power of religious persons and secular leaders sympathetic to him.”¹³

Tibetans have increasingly resisted their persecution by the Chinese and worked towards regaining their political and religious rights. Nevertheless, China has continued to use violent tactics of repression against the Tibetans. China regularly disregards the procedural safeguards of its own laws and constitution in documented cases of warrantless arrests, use of force to obtain confessions, fabricating charges, detention without charge, denial of a fair trial, punishment significantly disproportionate to the crime, torture, and killing unarmed protestors.¹⁴

(c) *Buddhist Monks Have Been Particularly Singled Out for Persecution*

Buddhist monks have been at the vanguard of Tibetan efforts to resist the Chinese campaign to eliminate Tibetan culture and religion. Between 1990 and 1994, for example, members of the Tibetan clergy led almost all of the 125 demonstrations for Tibetan independence.¹⁵ Chinese authorities consider Tibetan Buddhist monasteries to be “hotbeds of nationalism and pro-independence activists.”¹⁶ Accordingly, the Chinese authorities have singled monks out for persecution, including torture, murder, and extrajudicial detention. Protests by Tibetan monks and nuns who refused to denounce the Dalai Lama resulted in expulsions and arrests. In June 1997, a monk was detained for expressing support for the Dalai Lama when a Chinese “patriotic education” team required the monk to write a statement

¹² *Id.*

¹³ 1997 Country Report at 1; U.S. Department of State, *China Country Report on Human Rights Practices for 1998* (hereinafter “1998 Country Report”).

¹⁴ *Amnesty International Report 1998*, at 3.

¹⁵ Human Rights Watch, *Cutting Off the Serpent’s Head: Tightening Control in Tibet, 1994-1995*, 26.

¹⁶ Melvyn C. Goldstein, *The Snow Lion and The Dragon* 85 (1997); see also Seth Faison, *Icy Wind from Beijing Chills the Monks of Tibet*, N.Y. Times, Nov. 18, 1998 (noting that the Chinese authorities control monasteries tightly to minimize monks’ contact with the government-in-exile); 1998 Country Report at 4.

denouncing the Dalai Lama. As a result, he was beaten at the monastery and in detention centers in Tibet.¹⁷ Such treatment by the Chinese of political dissenters is commonplace.

The government-sponsored patriotic education campaigns intensified in 1997. According to the State Department, monks who did not sign a statement rejecting independence for Tibet, denouncing the Dalai Lama, recognizing the unity of China and Tibet, and vowing not to listen to the Voice of America were expelled from their monasteries and not permitted to return to their original homes.¹⁸

In June 1998, authorities in the Tibetan Autonomous Region reported that 98 people had been sentenced to prison in Tibet for “endangering national security” in 1996, including 14 monks from Ganden monastery that were imprisoned for clashing with government officials at their monastery in May 1996.¹⁹ Like Mr. X, these monks had been frequently forced to submit to unannounced, destructive searches of their personal property and their persons for pictures of the Dalai Lama and other cultural and religious materials. The 1998 Country Report also noted that a 22-year-old monk died as a result of torture suffered while incarcerated for participating in a pro-Dalai Lama demonstration.²⁰

B. Conditions Have Not Improved Since the Time of Mr. X’s Flight

1. Continuing Persecution

Since Mr. X’s departure from Tibet in December 1998, the human rights situation in Tibet has not improved. Indeed, it may have worsened. According to the 1999 Country Report:

Chinese government authorities continued to commit serious human rights abuses in Tibet, including instances of torture, arbitrary arrest, detention without public trial, and lengthy detention of Tibetan nationalists for peacefully expressing their political or religious views. Tight controls on religion and other fundamental freedoms continued and intensified during the year, especially during sensitive anniversaries and occasions.²¹

¹⁷ *Amnesty International Report 1998*, at 3.

¹⁸ *1997 Country Report*, at 740.

¹⁹ *Amnesty International Report 1998*, at 3.

²⁰ *Id.* at 2.

²¹ U.S. Department of State, *China Country Report on Human Rights Practices for 1999* (hereinafter “1999 Country Report”).

In particular, Chinese authorities continued their persecution of Buddhist monks and those who voiced political dissent. Imprisonment and torture of monks accused of political activism, the death of prisoners, and the closure of monasteries all continued to occur even after Mr. X left Tibet. The Chinese government has continued its “patriotic education” campaign aimed at controlling the monasteries and expelling sympathizers of Tibetan independence and supporters of the Dalai Lama. There have been numerous arrests of monks charged with distributing or possessing pictures of the Dalai Lama or with having links to exile groups.²²

For example, a 16-year-old Tibetan monk was sentenced to three years imprisonment and two years deprivation of political rights in July 1999 for shouting slogans such as “Free Tibet” in the Tibetan capital of Lhasa on the anniversary of the 1959 uprising in Tibet.²³ In August 1999, a teenage monk who shouted pro-independence slogans during rehearsal ceremonies for the National Minority Games was subjected to a prolonged beating in front of hundreds of spectators.²⁴

At the close of 1999, there were approximately 500 political prisoners being held in Tibet. Of the male detainees, 66 percent were monks.²⁵ Reports show that the rate at which Tibetan political prisoners are dying in detention or soon after release, demonstrably as a result of treatment while in detention, is increasing. The rate is particularly alarming at the Drapchi prison in Lhasa, the village in which Mr. X was arrested and detained. Male prisoners held at Drapchi died at the rate of 1 in 37. Overall, reports show an extraordinary death rate of 1 in 48 for Tibetan political prisoners as of the end of the year 1999.²⁶

2. Persecution of Tibetans in Nepal

With regard to the possibility of Tibetans finding a safe haven in Nepal, that, too, has declined precipitously in recent years. Not only are Tibetan refugees often forbidden to remain in Nepal, but instances of forcible repatriation of Tibetans, many of whom face persecution if they return to China, have increased.²⁷ In 1994, Tibetans who had recently arrived in Nepal told a congressional delegation that Nepali border guards had robbed and assaulted Tibetan refugees and turned them over to Chinese border guards. A congressional delegation in 1992 reported that 200 Tibetan refugees in Nepal were forcibly returned to China in 1991. In

²² *Id.*

²³ Amnesty International, *Amnesty International Report 2000*.

²⁴ *Id.*

²⁵ *1999 Country Report*.

²⁶ *Id.*

²⁷ Rachel Lostumbo, *Tibetan Refugees In Nepal: From Established Settlements to Forcible Repatriation*. 9 Geo. Immigr. L.J. 911.

1995, by contrast, more than 200 Tibetans were forcibly repatriated between April 23 and July 26 alone.²⁸

Furthermore, there are frequent reports of significant violations by China of the human rights of Tibetans who have been forcibly returned to Tibet. Under Chinese law, people caught crossing into Nepal without permission face a sentence of up to one year in prison, or many more if charged with attempting to contact the Dalai Lama and his government.²⁹

II. PERSECUTION OF MR. X

A. Personal Background

Mr. X's family has a history of political activism. Mr. X's father, Dorjee Wandu, was actively involved in the Tibetan guerilla movement called "Chipshe Gontuk" ("Four Rivers, Six Regions"), which sought to repel the Chinese invasion and occupation of Tibet. Chinese authorities imprisoned Mr. X's father from 1959 until 1973 for his involvement in the guerilla movement. Affidavit of Mr. X ("Mr. Aff.") (attached hereto as Exhibit A along with the Affidavit of Translation of Amchok Thubten G) ¶ 5.

Mr. X's mother, Sonam Tsomo, was stigmatized and persecuted as a result of her husband's involvement in the guerilla movement. In the early 1960s, Chinese authorities detained Mr. X's mother and sent her to a labor camp. *Id.* ¶ 6. Upon his release from prison, Mr. X's father was sent to the same labor camp. It was at this labor camp that Mr. X was born on February 10, 1975. In 1976, both of Mr. X's parents were killed in a tunnel collapse while working on road construction. Mr. X had no siblings and no other known relatives. Thus, Mr. X was raised by his grandmother in Thingry village in Tibet. *Id.* ¶ 7.

While in Tibet, Mr. X was never issued a birth certificate or any identifying papers. *Id.* ¶ 3. It is not unusual for a Tibetan refugee not to have any Tibetan identification card because Tibetans born in Tibet typically do not have birth certificates. Declaration of Dennis Cusack, Esq. ("Cusack Dec.") ¶ 19.³⁰ Since arriving in the United States, Mr. X has been issued a document certifying the date of his birth and his Tibetan nationality by the Office of Tibet, the official representative office for the Americas of His Holiness the Dalai Lama and the Central Tibetan Administration, in New York, New York.³¹

²⁸ *Id.* at 913-914.

²⁹ *Id.* at 914.

³⁰ A copy of the Declaration of Dennis Cusack, Esq., President of the International Committee of Lawyers for Tibet, is attached hereto as Exhibit C.

³¹ A copy of such certification is attached as Exhibit 1 to the Affidavit of Mr. X X.

B. Mr. X's Religious and Political Activities

In 1990, Mr. X joined the Tashi Lhaumbo Monastery in Shigatse. It was tradition in his family for the son to become a monk. Mr. X's grandmother encouraged him to continue the tradition and to find peace and meaning in his life. Mr. X Aff. ¶ 8. At the Tashi Lhaumbo Monastery, Mr. X became a Buddhist monk by taking the first of three steps to becoming the highest order monk. This first step is known as the Gatsel. As part of the Gatsel, Mr. X took a vow that consisted of four basic tenets of Buddhism. He vowed never to lie, kill a human being, engage in sexual misconduct, or steal. *Id.* ¶ 9.

Although the Buddhist monastery did not have political affiliations, Mr. X and some of his fellow monks believed in religious freedom and Tibetan independence. These feelings, combined with Mr. X's anger regarding the deaths of his parents at the Chinese labor camp, led to his decision to join Mr. Lobsang T and Mr. Sonam K, both of whom were also Tibetan Buddhist monks, on a trip to Lhasa. In July 1996, the three of them hung posters around Jukong and Pakor temples in Lhasa, which stated pro-independence messages such as "Free Tibet" and "Dalai Lama should return." *Id.* ¶ 10.

C. Detention and Persecution of Mr. X

On or about the evening of July 13, 1996, Mr. X and his two fellow monks were arrested by police officers for their activities. Following Mr. X's arrest in Lhasa, he was interrogated and beaten daily for three weeks. He was never formally charged with committing any crime, nor did he receive a trial. *Id.* ¶ 11.

On the first night, Mr. X was handcuffed, detained in a small room, and deprived of food, water, and access to a toilet. The next morning, Mr. X was interrogated in a separate room. Two to three officers at a time took turns severely beating him. They hit, kicked and beat him with wooden sticks and leather belts. He was interrogated and beaten every day, usually around ten o'clock in the morning to twelve noon. He was asked whether the monastery sent him and his two fellow monks to put up posters and whether there was an organizer or organization in charge of their activities. Mr. X was threatened and told that if he did not divulge the information requested, he would be given a life sentence or even executed. After three weeks, Mr. X and one other monk were transferred to the Thingry county jail. *Id.* ¶ 12.

Mr. X was detained, held incommunicado, and regularly beaten for almost two years in the Thingry county jail until August 3, 1998. The cell that he shared with his friend was small, cold, dark, dirty, and devoid of furniture. Every time the guards came into the cell to give them food or take them to the bathroom, they kicked and punched Mr. X, and pulled his ears and hair. While doing so, the guards continually expressed their hatred of monks. Mr. X was not allowed to have visitors and was not given any information about his detention or release. He still has scars on his scalp and knees from these beatings. *Id.* ¶ 13.

On several occasions, Mr. X was beaten until he began to bleed profusely. On one occasion in particular, a guard beat him so severely with a belt buckle that it knocked Mr. X unconscious. Though he suffered many serious physical injuries as a result of these systematic beatings, Mr. X never received any medical attention. *Id.* ¶ 14.

On or about August 3, 1998, Mr. X was released without any advance warning or explanation, though the authorities did first take his thumbprints. The prison authorities forbade him to return to the monastery. Thus, Mr. X returned to his grandmother's house in Thingry. One week after his release, two armed and uniformed policemen went to his grandmother's house and interrogated him about his activities and contacts with others. Seven to ten days later, the policemen again returned and questioned him further. *Id.* ¶ 15.

On or about December 5, 1998, the Chinese celebrated "Peaceful Liberation Day." Pro-independence posters were found in Thingry, and Mr. X was arrested for hanging the posters, even though he was not responsible. Two undercover policemen took him from the street to the police station. He was considered suspicious because of his previous activities. Mr. X was detained for two weeks. He was interrogated twice in the first week and on the fifth day of the second week at the Thingry police station. Mr. X was released on probation under certain conditions. He was not allowed to travel outside of the city without police permission. A high-ranking officer told Mr. X that they were continuing the investigation regarding the posters hung in Lhasa and Thingry. Mr. X was told that if it were found that he had been involved in the past or was involved in the future with putting up posters, he would be arrested and sentenced to life imprisonment. *Id.* ¶ 16.

When he was released, Mr. X returned to his grandmother's house. One week later, three police officers arrived at the house and thoroughly searched it. They found a few Buddhist texts, which they questioned Mr. X about and confiscated. The police ordered him to report for questioning to the police station on or about January 12, 1999. Fearing re-arrest and life imprisonment if he reported to the police station, Mr. X decided to flee Tibet. *Id.* ¶ 17.

D. Flight from Tibet

On or about December 27, 1998, Mr. X left Thingry and traveled by truck to the Dam border of Nepal, where he arrived on or about December 29, 1998. Mr. X had the help of a friend, who requested a Tibetan businessman to arrange for two Nepalese guides to take him to the Tibetan Reception Center in Nepal. The travel through the mountains took nearly a month. *Id.* ¶ 18.

On or about January 29, 1999, Mr. X arrived at the Tibetan Reception Center in Nepal, where he stayed for two weeks. Mr. X did not attempt to obtain, nor did he receive, legal status in Nepal because he was afraid of arrest. Officials at the Tibetan Reception Center had told him that Nepalese officials often returned Tibetan refugees to Tibet and that he should maintain a low profile. Mr. X then went to the Kupan Monastery in Kathmandu, where he stayed for six months. *Id.* ¶ 19.

While in Nepal, Mr. X came into contact with Mr. Labsang T, one of the fellow monks with whom he hung posters in Lhasa, Tibet. Mr. X had known Mr. T since 1980. Both were from the same monastery in Lhasa, Tibet. Mr. T assisted in making arrangements for Mr. X to leave Nepal and enter the United States. *Id.* ¶ 20.

In 1998, Mr. T had assisted another Tibetan monk, Mr. Ngawang X, under similar circumstances. Mr. Ngawang X was a Tibetan monk who fled to Nepal from Tibet after he was

persecuted by Chinese officials for distributing photographs of the Dalai Lama, Tibetan flags, and books about Tibet. Affidavit of Ngawang X (“Ngawang Aff.”) (attached hereto as Exhibit B along with the Affidavit of Translation of Amchok Thubten G) ¶ 1. Mr. T put Mr. Ngawang X in contact with his friend Kunga, who resided in Nepal. Kunga assisted in Mr. Ngawang X’s departure from Nepal by helping him secure a Nepalese passport and an airline ticket to the United States. *Id.* ¶ 2. Mr. Ngawang X arrived in New York, New York, United States in May of 1998 and successfully applied for asylum in 1999. *Id.* ¶ 3; *see also* I-589 Application for Asylum of Ngawang X (Alien No. 77544149).

Mr. Ngawang X, grateful for the assistance of Mr. T, promised that he would help in anyway possible should Mr. T come into contact with another Tibetan monk in similar circumstances. After Mr. T came into contact with Mr. X in Nepal, Mr. T contacted Mr. Ngawang X in New York to make him aware of Mr. X’s situation. Mr. Ngawang X then contacted a man in Nepal known as Dawa to ask him to help make arrangements for Mr. X’s departure from Nepal. With funds provided by Mr. Ngawang X, Dawa procured a Nepalese passport and an airline ticket for Mr. X. *Id.* ¶ 4.

On July 9 or 10, 1999, Mr. X flew to Singapore, where he stayed for nine days. He flew with other monks who had real Nepalese citizenship and were going to Singapore for religious purposes, so as not to raise the suspicions of the Nepalese authorities. Mr. X did not seek and was not offered legal status in Singapore because his final intended destination was the United States. On or about July 17, 1999, Mr. X flew from Singapore to the United States, transiting for two hours in an unknown destination. Mr. X arrived in New York, New York on July 18, 1999 and entered this country with a R-1 visa. Mr. X met Mr. Ngawang X for the first time upon his arrival at JFK Airport in New York and lived with him for nearly a year. Mr. X Aff. ¶ 22.

E. Fear of Persecution Upon Return

If Mr. X were to return to Tibet, he believes that he would immediately be arrested, tortured and possibly killed because he did not report to the Thingry police station on January 12, 1998. The authorities in Tibet have his name and thumbprints, thus he could be easily identified and captured. He did not have permission to leave the city, much less the country. Moreover, Mr. X still harbors strong political opinions concerning the Chinese occupation of Tibet. Since arriving in the United States, Mr. X has continued his political activism. In March 2000, he participated in a demonstration in New York against the Chinese occupation of Tibet. Mr. X participated in a similar demonstration in Washington, D.C. in the summer of 2000. *Id.* ¶ 23.

LEGAL ARGUMENT

I. MR. X IS A REFUGEE AS DEFINED BY THE IMMIGRATION AND NATURALIZATION ACT

Mr. X is eligible for asylum in the United States because he qualifies as a refugee on two grounds: (i) he has suffered past persecution on account of his Tibetan nationality, Buddhist religion, membership in the particular social group of Tibetan Buddhist monks, and

political opinions in opposition to the Chinese occupation of Tibet and oppression of Tibetan culture, and (ii) he has a well-founded fear of persecution on account of these same factors.

Pursuant to Section 208 of the Immigration and Naturalization Act (“INA”), 8 U.S.C. § 1158(b)(1), the Attorney General, in the exercise of his or her discretion, may grant asylum to an alien if it is determined that such alien is a “refugee” within the meaning of the INA. The INA defines “refugee” in relevant part, as follows:

The term “refugee” means (A) any person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). Thus, an alien applying for asylum may establish refugee status on either of two bases: (i) past persecution on account of one of the enumerated categories, or (ii) a well-founded fear of future persecution on account of one of the enumerated categories. *Osorfo v. LAIS*, 18 F.3d 1017, 1027 (2d Cir. 1994); *see also* 8 C.F.R. § 208.13(b) (1999) (applicant may qualify as a refugee because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution). These two bases are alternative methods of establishing eligibility for refugee status and an applicant need not establish both. *See Matter of Chen*, BIA Int. Dec. 3104, 1989 WL 331860 at *3 (B.I.A. 1989). As noted, Mr. X qualifies as a refugee on both grounds.

A. Mr. X Qualifies as a Refugee Because He Has Suffered Past Persecution on Account of His Nationality, Religion, Membership in a Particular Social Group, and Political Opinions.

It is well settled that a showing of past persecution on account of one or more of the enumerated statutory grounds constitutes *prima facie* entitlement to refugee status. Federal regulations promulgated under the INA provide, in relevant part, that:

An applicant *shall* be found to be a refugee on the basis of past persecution if he or she can establish that he or she has suffered persecution in the past in his or her country of nationality . . . on account of race, religion, nationality, membership in a particular social group, or political opinion, and that he or she is unable or unwilling to return to or avail himself or herself of the protection of that country owing to such persecution.

8 C.F.R. § 208.13(b)(1) (emphasis added); *see also Matter of Chen*, BIA Int. Dec. 3104, 1989 WL 331860 at *3 (B.I.A. 1989) (“If an alien establishes that he has been persecuted in the past for one of the five reasons listed in the statute, he is eligible for a grant of asylum.”).

Thus, an alien establishes a *prima facie* entitlement to refugee status by demonstrating that (i) he has suffered past persecution; (ii) such persecution was inflicted on

account of a statutorily enumerated characteristic, and (iii) owing to such persecution, he is unable or unwilling to avail himself of the protection of his country. All three elements are met in Mr. X's case.

1. Mr. X Has Suffered Past Persecution

Mr. X suffered past persecution by Chinese authorities between July 1996 and December 1998. Mr. X Aff. ¶ 11-17. In order to establish that an applicant has been persecuted in the past, the applicant "need only establish that objective fact." *Matter of Chen*, BLA Int. Dec. 3104, 1989 WL 331860 at *4 (B.I.A. 1989). Mr. X's affidavit provides a detailed and credible account of his persecution. He was arrested and detained simply for expressing his religious and political opinions by hanging posters stating "Free Tibet" and "Dalai Lama Should return." He was beaten severely on a regular basis by Chinese authorities on account of his opinions for over two years. Mr. X Aff. ¶ 10-14.

The brutal and inhuman beating to which Mr. X was subjected plainly constitutes persecution within the meaning of the INA. The Chinese police officers never actually charged Mr. X with a crime, thereby rendering his arrest arbitrary. Even if the officers had charged Mr. X with a crime, there is no question that their conduct constitutes persecution. The *INS Basic Law Manual* at 20-21 provides that certain types of suffering or harm, including torture and other cruel and inhuman treatment, always constitute persecution. Persecution includes, among other things, arbitrary arrest, detention without trial, and physical or mental torture. *See, e.g., Desir v. Kchert*, 840 F.2d 723, 727 (9th Cir. 1988); *see also Singh v. Ilchert*, 801 F. Supp. 313, 319 (N.D. Cal. 1992) (police beating imposed without any judicial process is persecution if it "is excessive and arbitrary and is inflicted with [an impermissible] motive"). International law also recognizes that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." *See Universal Declaration of Human Rights*, Article 5, General Assembly Resolution, 217 (A)(111) (December 10, 1948). The extrajudicial detention and beating suffered by Mr. X at the hands of Chinese authorities certainly qualify as cruel and inhuman treatment constituting persecution.

The INS recognizes that other types of conduct can contribute to an overall pattern of persecution. For example, the *INS Basic Law Manual* notes that constant surveillance and/or arbitrary interference with a person's privacy contributes to the persecution that an individual may suffer. *See INS Basic Law Manual* at 21. Chinese authorities conducted unannounced inspections at Mr. X's home that not only interfered with Mr. X's privacy, but also with his religion. On one occasion, they interrogated him at his home regarding his contacts and activities with other people. On another, they confiscated Buddhist texts found in his home. Mr. X Aff. ¶ 15, 17. Authorities went so far as to arrest and detain Mr. X falsely for activities for which he was not responsible simply on suspicions raised by his prior activities. *Id.* ¶ 16. Such conduct on the part of the Chinese authorities constitutes an overall pattern of persecution.

2. Past Persecution Was Inflicted on Account of His Membership in Particular Social Group, Religion, Political Opinions, and Nationality.

The past persecution suffered by Mr. X was inflicted on account of four out of the five statutorily enumerated grounds, though fulfillment of only one of those statutory grounds is

necessary and sufficient. Mr. X was persecuted on account of his (i) Tibetan nationality; (ii) Buddhist religion; (iii) political opinions; and (iv) membership in a social group consisting of Tibetan Buddhist monks who oppose Chinese oppression of Tibetan culture and nationalism. Mr. X's affidavit, corroborated by the Declaration of Dennis Cusack, Esq., and by the record of Chinese abuses in Tibet compiled by the U. S. State Department and others, provides detailed and credible evidence that Mr. X's past persecution was inflicted due to his nationality, religion, political opinions and membership in a particular social group. Moreover, Mr. X's credible testimony "may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. § 208.13(a).

(a) Membership in a Particular Social Group

For an applicant to establish eligibility for relief based upon his membership in a particular social group, the applicant must establish that the group is cognizable as a "particular social group" under the INA and that he possesses the traits that make the group cognizable from the perspective of the persecutors. *See, e.g., In re R-A-*, BIA Int. Dec. 3403 (B.I.A. 1999); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1573-75 (9th Cir. 1986). The phrase "particular social group" has been construed to mean "person of similar background, habits or social status." UNHCR Handbook, 77; *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985). The phrase has been defined in further detail as "a group of persons, all of whom share a common, immutable characteristic, *i.e.*, characteristic that is beyond the power of the individual members of the group to change or is so fundamental to their identity that it ought not to be required to be changed." *Matter of Acosta*, I & N Dec. 211 (1985); *Matter of Virgil*, 19 I & N Dec. 572 (BIA 1988); *see also Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) ("a discrete, relatively homogenous group targeted for persecution because of assumed disloyalty to the regime"); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor - or in the eyes of the outside world in general").

Tibetan Buddhist monks who peacefully oppose Chinese efforts to undermine Buddhism and Tibetan culture constitute a particular social group within the meaning of the INA under any of these formulations. Members in this discrete and recognizable group share several common characteristics such as vows never to use violence, commit any crime, or tell any lies; years of devotion to memorizing Buddhist texts; similar outward appearance; and a desire to preserve Tibetan culture and religion. These characteristics are undoubtedly fundamental aspects of the identities of Tibetan monks, yet the Chinese authorities have forced Tibetan monks to abandon these deeply held values and customs, contrary to the norms of international human rights law. *See, e.g., UNHCR Handbook*, 51; *INS Basic Law Manual* at 20. Furthermore, evidence demonstrates that these same characteristics define this social group from the Chinese authorities' perspective, and that the Chinese authorities seek to control and eliminate this group.³²

³² *See, e.g., 1998 Country Report* at 1 (Tibet appendix) (noting that Chinese authorities view Buddhist practices "as vehicles for political dissent" and promptly and forcibly suppress them); Melvyn C. Goldstein, *supra*, at 85
(continued . . .)

Tibetan monks are targeted by Chinese inspectors explicitly on account of their status as Tibetan monks. *See, e.g.*, Cusack Dec. ¶ 11. For example, monks at Tibetan monasteries are continually subjected to arrest and persecution at the hands of Chinese inspectors who regularly visit monasteries in search of material that those inspectors associate with this social group.

Mr. X is a Tibetan Buddhist monk of the Gelupga sect, the same sect to which the Dalai Lama belongs. He joined the Tashi Lhaumbo Mnastery in Shigatse in 1990. He has taken the first of three steps to becoming the highest order monk. As part of this first step, known as the Gatsel, he took a vow that consisted of four basic tenets of Buddhism. He vowed never to lie, kill another human being, engage in sexual misconduct, or steal. Mr. X Aff. ¶ 8-9. Mr. X was identified by Chinese police officers as being a Tibetan Buddhist monk when they arrested him in July 1996. He was arrested because he hung posters calling for the return of the Dalai Lama, the spiritual leader of Tibet and of Mr. X's sect. *Id.* ¶ 10-11. In December of 1998, police officers entered Mr. X's home unannounced and conducted a warrant less search. They found several Buddhist texts and immediately confiscated them. *Id.* ¶ 17. These facts establish that Mr. X was persecuted on account of his membership in the particular social group of Tibetan Buddhist monks.

(b) Religion

As described above, Mr. X is a Tibetan Buddhist monk. He was arrested, detained, and severely beaten for over two years for hanging posters expressing support for the return of the Dalai Lama, the spiritual leader of Tibet and of Mr. X's sect. *Id.* ¶ 10-11. Upon his release from detention of over two years at the Thingry county jail, Chinese authorities forbade him from returning to his monastery, thereby obstructing the practice of his faith. *Id.* ¶ 15. Chinese authorities also entered Mr. X's home and confiscated his Buddhist texts after his release from prison, which further obstructed the practice of his Buddhist faith. *Id.* ¶ 17. These facts establish that Mr. X was persecuted on account of his religion.

(c) Political Opinions

Mr. X was also persecuted on account of his political opinions. When Chinese authorities arrested, detained, and severely beat Mr. X in July 1996, it was because they caught him hanging posters that stated pro-Tibetan independence messages such as "Free Tibet" and "Dalai Lama should return." *Id.* ¶ 10-11. China has banned the administration of the Dalai Lama, Tibet's political and spiritual leader, and forced the Dalai Lama to flee to India. Any expression of sentiment for independence or the Dalai Lama is outlawed in Tibet, and the consequences of being caught expressing such sentiments virtually always include beating, arrest, and torture. Cusack Dec. ¶ 12. The opinions expressed by Mr. X were directly in conflict with the agenda of the Chinese authorities, and they punished him for it.

(noting that Chinese authorities consider Tibetan Buddhist monasteries to be "hotbeds of nationalism and pro-independence activists").

(d) Nationality

Mr. X is an unwilling Tibetan national. He believes in the independence of Tibet, and he strongly opposes the systematic suppression of Tibetan culture by the Chinese authorities. Such were the reasons that prompted him to participate in the hanging of the posters advocating Tibetan independence and the return of the Dalai Lama, an activity for which Chinese authorities arrested, detained, and severely beat him for over two years. These facts demonstrate that the Chinese authorities persecuted Mr. X on account of his nationality.

Mr. X's personal account of persecution on the basis of his nationality, religion, and political opinion is corroborated by and consistent with substantial objective evidence. *See* Section I, *supra*; Cusack Dec. In light of these facts, Mr. X has clearly demonstrated that his persecution was on account of the enumerated grounds.

3. Mr. X is Unable to Avail Himself of the Protection of his Country

Insofar as Chinese government officials are themselves the persecutors, Mr. X *a fortiori* is unable to avail himself of the protection of his country. The Chinese government is committed to the persecution of Tibetan Buddhist monks who advocate the independence of Tibet. Thus, Mr. X satisfies all three elements of a prima-facie showing of refugee status based upon past persecution. He has (i) suffered past persecution (ii) on account of his nationality, religion, political opinion, and membership in a particular social group, and (iii) is unable to avail himself of the protection of his country from such persecution.

B. Mr. X Qualifies as a Refugee Because He Has a Well-Founded Fear of Future Persecution on Account of His Nationality, Political Opinions, Religion, and Membership in a Particular Social Group

Mr. X is also eligible for asylum because he has a well-founded fear that if he were returned to China, he would be imprisoned, tortured, and possibly killed by Chinese authorities in Tibet due to his nationality, political and religious activities and his membership in the particular social group of Tibetan Buddhist monks. Mr. X's experience of persecution gives rise to a presumption of a well-founded fear of future persecution because, after that experience, Mr. X fled his homeland and never returned, and because human rights conditions have only worsened for Tibetans since that time. Even putting aside the presumption of fear arising from Mr. X's past experience, Mr. X clearly demonstrates a well-founded fear of future persecution on the merits.

1. Regulatory Presumption of a Well-Founded Fear of Future Persecution

Mr. X's past persecution gives rise to a regulatory presumption of a well-founded fear of future persecution.

If it is determined that the applicant has established past persecution, he or she *shall* be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions

in the applicant's country of nationality . . . have changed such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return.

8 C.F.R. § 208.13(b)(1)(i) (1999) (emphasis added); *Sivaainkaran v. INS*, 972 F.2d 161, 164 n.2 (7th Cir. 1992). Mr. X has established severe persecution in the past, and this experience amply supports his fear of future persecution, particularly as he fled his homeland never to return following that experience. Moreover, nothing in the available evidence suggests that conditions in Mr. X's country have changed such that he no longer has a well-founded fear of future persecution. In fact, conditions in Tibet have deteriorated since Mr. X's flight in 1998. See Section I(B)(1), *supra*. Given evidence of Mr. X's past persecution and evidence of worsened human rights conditions in Tibet since his departure, Mr. X is entitled to a regulatory presumption of a well-founded fear of future persecution.

2. Well-Founded Fear of Future Persecution on Account of Nationality, Religion, Political Opinion, and Membership in a Particular Social Group

In addition to the regulatory presumption of a well-founded fear of future persecution to which Mr. X is entitled, he can also establish refugee status on the basis of a fear of future persecution by demonstrating: (i) subjective fear of persecution on account of one or more of the enumerated grounds; (ii) an objectively reasonable possibility of actually suffering such persecution; and (iii) the inability or unwillingness to seek the protection of his country because of such fear. 8 C.F.R. § 208.13(b)(2); *Melendez v. US Dept. of Justice*, 926 F.2d 211, 215 (2d Cir. 1991).

Mr. X's detailed and credible affidavit sets forth his genuine, subjective fear of future persecution on account of his nationality, religion, political opinion, and membership in a social group. In order to establish that his subjective fear is objectively reasonable, Mr. X need not "prove that it is more likely than not that he will be persecuted." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (holding that a well-founded fear could exist where there is as little as a ten percent probability of the feared persecution occurring). Mr. X need only show that there is a "reasonable possibility" that he would be persecuted if he were forced to return to China. *Melendez*, 926 F.2d at 215; *INS Basic Law Manual* at 26. Mr. X can establish that his fear is well-founded by demonstrating:

(A) there is a pattern or practice in [Tibet] of persecution of groups of persons similarly situated to [Mr. X] on account of religion, nationality, membership in a particular social group, or political opinion, and (B) he is a member of and, identifies with such group of persons such that his fear of persecution upon return is reasonable.

8 C.F.R. § 208.13(b)(2)(i)-(ii).

The record clearly establishes that a reasonable person in Mr. X's circumstances would fear persecution by the Chinese government. The Chinese government has a long-

standing “pattern or practice” of persecuting Tibetan monks who oppose Chinese control over their country and religion. Indeed, the Chinese government considers the practice of Tibetan Buddhism and the belief in the spiritual and temporal authority of the Dalai Lama to be a crime. Merely offering public prayers for the Dalai Lama is illegal.³³

The Chinese government has identified Mr. X as an active participant in the pro-Tibetan independence movement. *See* Cusack Dec. ¶ 14. They have specifically warned him that should they determine that he continues to be involved in the Tibetan pro-independence movement, which is in fact the case, they would re-arrest him and sentence him to life imprisonment. Moreover, Mr. X had been ordered to report to the police station on or about January 12, 1999 so that the authorities could continue their investigation of his activities. Given that Mr. X fled from the Chinese authorities and that they have his thumbprints, there is a significant possibility that he would be immediately arrested if he were forced to return to Tibet. *See id.* ¶ 16. The threat is even more imminent given the fact that Tibetans who come to the U.S. are monitored by networks of Chinese nationals who report back the Chinese embassy about the activities of other Chinese and Tibetans abroad, such as Mr. X. *Id.* ¶ 19. If arrested, it is very likely, given his past record, that Mr. X would be badly tortured. *Id.* ¶ 16.

For all of these reasons, Mr. X’s fear of future persecution is clearly grounded in reality. The objective evidence paints a dismal picture of the conditions facing Tibetan Buddhist monks who oppose China’s attempts to wipe out Tibetan culture. The evidence documents that monks engaging in activities identical to those that Mr. X engaged in are detained, tortured, and killed on a regular basis. Given that Chinese government officials are themselves the persecutors, Mr. X *a fortiori* is unable to avail himself of the protection of his country.

In light of these facts, Mr. X has satisfied all three of the necessary elements to establish refugee status on the basis of a well-founded fear of future persecution: (i) his testimony regarding his subjective fear of future persecution on account of four of the five enumerated grounds; (ii) the abundant objective evidence demonstrating a reasonable possibility of actually suffering such persecution; and (iii) his inability to seek the protection of his country because of such fear. 8 C.F.R. § 208.13(b)(2); *Melendez*, 926 F.2d at 215.

II. MR. X IS ENTITLED TO A FAVORABLE EXERCISE OF DISCRETION GRANTING HIM ASYLUM

Since Mr. X has demonstrated that he is a refugee within the meaning of the INA, the asylum officer has the discretion to grant him asylum. *See* 8 U.S.C. § 1158(b)(1); 8 C.F.R. § 208.14(a) (1999). In adjudicating asylum applications, asylum officers should “take into account [their] affirmative obligations under international law to extend refugee status to those who qualify for such relief.” *In Re O-D-*, 1998 WL 24904 (B.I.A. 1998). In general, asylum should be granted to eligible aliens unless significant adverse factors counsel against it when weighed in the totality of circumstances surrounding the alien’s flight. *Matter of Pula*, 19 I. & N. Dec. 467, 473-4 (B.I.A. 1987).

³³ *See* Asia Watch Committee, Human Rights in Tibet 13-24 (1988).

Where, as here, an applicant demonstrates a well-founded fear of persecution if he were to be returned to his country, “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *Id.*; *INS Basic Law Manual* at 70 (asylum should be denied as a matter of discretion only in exceptional circumstances, where the asylum officer can articulate specific factors that are sufficiently serious to justify an unfavorable exercise of discretion).

Mr. X’s case involves none of the most serious adverse factors recognized under the regulations or case law, and no statutory bars to asylum are present. Mr. X has never participated in the persecution of others. 8 U.S.C. § 1101(a)(42)(B). He has never been convicted of a criminal offense in any country. 8 C.F.R. § 208.14(c)(2)(i). Nor has he resettled in any other country or returned to his homeland following his persecution. *Id.* Finally, Mr. X poses no security risk to the United States. *Id.*

Mr. X did obtain a false Nepalese passport, but this was only because he had no Chinese travel documents, and he believed that obtaining a Nepalese passport would be the only possible way to reach the United States and escape persecution. Although the use of unauthorized documents is a relevant discretionary factor, it “is not a significant adverse factor” where, as here, the fraudulent documents were used to escape persecution. *Matter of Pula*, 19 I. & N. Dec. at 474. *Matter of Pula* distinguished between the purchase of falsified documents and entering the United States under the assumed identity of a U.S. citizen with a passport fraudulently obtained from the U.S. government, which is a very serious fraud and grounds for an unfavorable exercise of discretion. *Id.* Mr. X’s case involves only the former, relatively minor, circumvention of orderly refugee procedures.

In addition to entering the United States, Mr. X did also enter Nepal and Singapore. However, neither country offered permanent resettlement to Mr. X. In fact, the government of Nepal regularly hands over Tibetan refugees like Mr. X to the Chinese authorities. *See* Section I(B)(2), *supra*.

Because Mr. X has demonstrated a well-founded fear of future persecution and because of the severe nature of his past persecution, general humanitarian considerations weigh heavily in support of a favorable exercise of discretion in granting him asylum.

III. ALTERNATIVELY, MR. X IS ENTITLED TO THE WITHHOLDING OF REMOVAL

An application for asylum is also regarded as an application for withholding of removal. The Attorney General may not remove or return any alien, subject to certain exceptions not applicable here, to any country where “the alien’s life or freedom would be threatened in such country on account of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.” I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3)(A). Section 241(b)(3) is a provision that entitles an alien to a mandatory, not discretionary, withholding of removal upon proof of a clear probability of persecution on one of the aforementioned grounds. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1491 (9th Cir. 1986). To demonstrate a clear probability of persecution, an alien must show that it is “more likely than not that the alien would be subject to persecution” if returned. *INS v. Slevic*, 467 U.S. 407, 424

(1984); *see also* 8 C.F.R. § 208.16(b)(1) (1999). If the applicant is found to have suffered past persecution “such that his or her life or freedom was threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his or her life or freedom would be threatened [upon] return . . . unless a preponderance of the evidence establishes that conditions in the country have changed to such an extent that it is no longer more likely than not” that the applicant would be persecuted there. 8 C.F.R. § 208.16 (b)(2).

It is respectfully submitted that Mr. X has met that burden. As demonstrated above, Mr. X has suffered past persecution such that his life and freedom were threatened in Tibet. Mr. X was severely beaten and extrajudicially detained on account of his nationality, religion, political opinions, and membership in a particular group. Moreover, the well-established pattern of persecution by the Chinese authorities against Tibetan Buddhist monks who participate in peaceful pro-Tibetan activities establishes beyond a doubt that it is more likely than not that Mr. X’s safety would be seriously threatened upon his return to Tibet. For all these reasons, Mr. X is entitled as of right to the withholding of removal from the United States.

CONCLUSION

Mr. X has demonstrated past persecution at the hands of the Chinese government on the basis of his nationality, political opinions, religion, and membership in a particular social group in addition to a well-founded fear of future persecution on the same grounds. Mr. X therefore qualifies as a refugee. There is clear and substantial likelihood that Mr. X's life would be at risk should he be compelled to return to Tibet. Considering that no major adverse factors counsel against a grant of asylum, that no mandatory bars to asylum exist, and that positive, general humanitarian factors counsel in favor of asylum, it is respectfully requested that the asylum officer, in the exercise of his or her sound discretion, grant asylum to Mr. X.

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