

Multistate Performance Test

July 2020

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July 2020
MPT-1 File

In re Alice Lindgren

Neighborhood Immigration Services

15 Wall Street
Franklin City, Franklin 33705

MEMORANDUM

TO: Examinee
FROM: Elizabeth Saylor, Supervising Attorney
DATE: July 28, 2020
RE: Alice Lindgren's U Visa Case

I am assigning you a U nonimmigrant visa (U visa) case for pro bono client Alice Lindgren. U visas were created by the Victims of Trafficking and Violence Protection Act of 2000 (VTVPA). They are meant to encourage immigrant victims of crime, who might otherwise be afraid to interact with law enforcement, to report crime and assist in the investigation or prosecution of crimes that occur in the United States. We did an intake with Alice Lindgren and determined that she was eligible for a U visa. We now need to prepare her U visa application.

Ms. Lindgren's U visa application will be submitted to United States Citizenship and Immigration Services (USCIS) and will include a Form I-918 Petition for U Nonimmigrant Status (Petition) and supporting materials, including an affidavit from Ms. Lindgren. I will prepare the Petition and the supporting materials, but I need your assistance with drafting the cover letter. This cover letter is our only opportunity to argue that the facts and the law support our client's eligibility for a U visa.

I have attached a memorandum that sets forth our firm's conventions for drafting cover letters to USCIS. This format has proven to be effective in our past advocacy for clients. For this reason, it is critical that your letter follow the guidelines in that memorandum. Our client's future rests on this letter. Your cover letter should argue that Ms. Lindgren meets all the eligibility requirements for a U visa.

I have attached the relevant sections of the Immigration and Nationality Act (INA), which is the primary collection of statutes governing immigration law. I have also attached relevant sections of Title 8 of the Code of Federal Regulations (C.F.R.) and two relevant state statutes. Please cite the INA, 8 C.F.R., and the state statutes in your cover letter (e.g., 8 C.F.R. § 214.2(c)(5)(A)). All the documents referenced in the file will be attached to the cover letter that we submit to USCIS.

Neighborhood Immigration Services

TO: Neighborhood Immigration Services attorneys and paralegals
FROM: Carol Wu, Executive Director
RE: Cover letters that accompany initial submissions to USCIS

Follow these guidelines in drafting cover letters that accompany initial submissions to United States Citizenship and Immigration Services (USCIS). Cover letters will be printed on letterhead.

Date:

Recipient's Address: USCIS
Franklin Service Center
119 Exchange St.
Franklin City, FR 33705

Subject: Type "Re:" followed by the client's name, the client's alien number or "A number" (if he or she has one), and the number and name of the form or petition being filed on separate lines.

Re: Tom Nguyen
A 33-44-555
Form I-918 Petition for U Nonimmigrant Status

Greeting: Dear USCIS Officer:

Body: Begin with the purpose of the letter and state that we represent the client. E.g., "We represent Mr. Tom Nguyen in his Form I-918 Petition for U Nonimmigrant Status. We submit this letter, Mr. Nguyen's Form I-918, and documents in support of his petition for a U visa."

Note that the cover letter is an opportunity to "brief" and argue for our client's eligibility. For each eligibility requirement, state the law and then argue how the facts of our client's case satisfy that requirement. Provide relevant legal citations, usually from the INA and Title 8 of the C.F.R. Do not include a separate statement of facts. Instead, use the facts in arguing that the client meets the requirements of the statutes, regulations, and/or case law.

Be sure to use a heading for each requirement that clearly identifies the immigration requirement being addressed. You do not need to provide citations to documents or evidence. Our paralegal will prepare an index of supporting documentary evidence.

Closing: Tell the immigration officer to contact you with questions or if he or she needs additional information. Offer thanks for USCIS's consideration of the application or petition.

Signature: Elizabeth Saylor, Supervising Attorney

Copies: cc: [client name]

Enclosures: Type "Enclosure" or "Enclosures" as appropriate.

**DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES**

Affidavit of Alice Lindgren, A 21-454-988

In Support of Her Form I-918 Petition for U Nonimmigrant Status

1. My name is Alice Lindgren. I submit this affidavit in support of my petition for a U visa.
2. I was born in Stockholm, Sweden, on June 8, 1996. I am a native and citizen of Sweden.
3. I came to the United States on August 10, 2018, on an F-1 student visa. I obtained the F-1 visa to enter the United States to study at the University of Franklin in Franklin City, Franklin. I have resided in Franklin City and have not left the United States since my arrival. My F-1 visa has lapsed.
4. I studied architecture as an undergraduate and wanted to come to the United States to obtain a graduate degree in architecture. The University of Franklin has a highly competitive architecture graduate program. I was accepted into the program and was excited to attend.
5. Additionally, my boyfriend, an American citizen, lived in Franklin City, and I wanted to continue my relationship with him. I met him while he was an exchange student in Sweden.
6. On February 5, 2020, I was mugged right across the street from campus. I was staying late in the architecture studio to finish up a final project. I left the architecture building around 11:00 p.m. to walk to a late-night coffee shop to pick up a cup of coffee and a pastry. The coffee shop is just across the street from the campus. That area is a bit seedy.
7. Just as I crossed the street, I heard footsteps running up behind me. I turned to see a man running toward me. I started to run and tripped. I tried to catch myself with my hands. I felt a sharp pain in one wrist. I fell onto the concrete, skinning my face pretty badly. While I was on the ground, the man pulled my backpack off my back. I heard his footsteps running away. I waited a minute before I lifted my head. I saw him jump into the backseat of a car that sped off. I saw the first three numbers of the license plate.
8. I was very shaken up. I went back to the architecture studio. My classmates were shocked when I walked in because my face was bloody. They called the campus police, who met me at the architecture building and took me to the local police precinct. I stayed at the precinct for about an hour making a report. I told the police everything I knew about the incident. I told the police about the numbers I saw on the license plate and described the man who attacked me.

9. When I got home, my boyfriend and I washed the blood off my face and cleaned the gravel out of the wounds on my face. The next morning, I saw my primary care doctor. The doctor further cleaned up and bandaged my wounds. She determined that I had a bruised wrist.

10. About one month later, I received a call from a police detective. A man had tried to pawn the laptop that had been in my backpack. He fit the description I had given to the police. He also owned a car that fit my description of the getaway car, and the license plate numbers matched.

11. The detective asked me to come to the precinct to see if I could identify the man in a lineup. I was afraid and felt that I could not bear to see the man again, so I refused.

12. Six weeks later, the case against him went to trial. I met with Mary Garcia, the assistant district attorney, before the trial and then testified at trial. I was very afraid to look at the defendant while I was in court, but I was stoic and told my story to the jury. In my testimony, I identified the defendant as the man who attacked me that night. The jury found the defendant guilty of robbery.

13. I have had a lot of emotional problems since the incident. I am afraid to go out at night. I have trouble sleeping and have nightmares. I have been afraid to go to campus, and I dropped out of school. My boyfriend and I broke up. I have been seeing a counselor to deal with post-traumatic stress disorder associated with the event.

14. Even though I have been greatly traumatized during my time here in Franklin City, I would like to remain here and eventually continue my architecture studies at the University of Franklin.

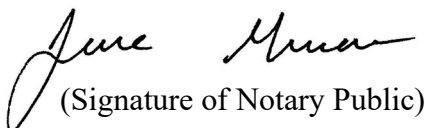
I declare to the best of my knowledge that the information above is true and complete.



Alice Lindgren

July 21, 2020

Sworn to before me on this
21st day of July, 2020



(Signature of Notary Public)

Franklin City Police Department, 12th Precinct
Franklin City, Franklin
Incident Report No. 237894

Reporting Officer: James Sanders
Approving Officer: Alfred Mathews

Date/Time Reported: 02/06/2020, 1:05 a.m.

PERSONS:	Role	Name	DOB	Race	Sex
	Victim	Alice Lindgren	6/8/96	Caucasian	Female

OFFENDER(S):

Middle-aged Caucasian male, salt-and-pepper beard, black jacket, running shoes

VEHICLES:

Older Toyota Camry, rusty, green, license plate 406xxxx

PROPERTY:

Navy blue backpack containing wallet, \$80 cash, iPhone, MacBook Air, red cardigan

NARRATIVE:

University of Franklin Police Department contacted 12th Precinct about suspected robbery. UFPD Officer Solomon brought victim to precinct to make report. Officers Sanders and Wong met with victim and took report. Victim had multiple contusions and bleeding on left side of face. Victim complained of wrist pain. Victim was visibly upset with recurrent episodes of crying. Victim reported that she left campus around 11:00 p.m. on 02/05/2020 to go to Koffee, 501 State Street, to get a snack to go. She reports she was chased on the sidewalk outside of 300 State Street. Victim tripped and fell to the ground, and assailant stole her backpack. Victim began screaming. Victim reports that assailant told her to shut up. Assailant escaped on foot and then jumped into the back of a green Toyota Camry. There were no other witnesses to the incident.

OFFENSE(S):

Robbery, Fr. Penal Code § 29

NEIGHBORHOOD IMMIGRATION SERVICES

FILE MEMORANDUM

From: Elizabeth Saylor
Date: July 18, 2020
Re: Alice Lindgren's I-918 Supplement B

We have a signed Form I-918 Supplement B from Officer James Sanders at the Franklin City Police Department certifying that Ms. Lindgren (A 21-454-988) was a victim of robbery, that she has been helpful in the investigation and prosecution of the robbery, and that she suffered injuries to her wrist and face as a result of the robbery. He attached reports on her known injuries. It was signed on April 26, 2020. I asked Officer Sanders to certify that Ms. Lindgren was a victim of aggravated assault as well, but he refused, saying that the defendant was prosecuted only for robbery.

Officer Sanders's refusal to add aggravated assault to the Form I-918 Supplement B complicates Ms. Lindgren's case. The relevant immigration laws list the specific crimes that qualify a victim to petition for a U visa. Felonious assault is an enumerated crime, but robbery is not.

We will need to argue that robbery is a similar crime to felonious assault in Franklin. I have put a printout from an immigration experts' listserv regarding this issue in the file (attached). While not authoritative, this discussion should help us to formulate successful arguments that Ms. Lindgren meets the qualifying crime requirement for the U visa.

[Archive] Crimmigration Experts Forum Listserv

Query: Does robbery qualify an individual for a U visa?

Emily

10-03-2019, 1:07 pm

I have a new client who we think should be eligible for a U visa. She has an I-918 Supplement B from the police department certifying that she was a victim of robbery. Of course this isn't a qualifying crime for a U visa. Any suggestions about what to do?

Sonia

10-03-2019, 2:15 pm

You have to argue that robbery is similar to felonious assault. It is extremely difficult to successfully argue "similar" crimes.

Monica

10-03-2019, 2:37 pm

Make sure you look at 8 CFR 214.14(a)(9). You must argue that the nature and elements of robbery are similar to the nature and elements of felonious assault using your state's penal code provisions. The proper inquiry is not an analysis of the factual details underlying the crime, but a comparison of the nature and elements of the crime that was investigated or prosecuted and the crime enumerated in the statute and regulations. By "nature of the crime" the regulations mean the inherent character of the crime as defined by the criminal statute. We have had a number of robbery cases approved.

Juan

10-04-2019, 11:01 am

Good luck, Emily. Here in Olympia, the elements for robbery and felonious assault are very different. We have filed several cases arguing that robbery and felonious assault are similar crimes, and they have all been denied. I hope your state's statutes for robbery and felonious assault are more similar than those we have here in Olympia.

Etsuko

10-05-2019, 1:20 pm

USCIS hasn't provided any guidance on this. We make the best argument we can looking at the elements and the nature of the crimes. We know there have been a lot of denials because some states' robbery statutes are so different from those states' aggravated assault statutes.

Emily

10-06-2019, 11:59 pm

Thanks to everyone for the help. I really appreciate it!

Charles Einhorn, PhD
1501 Jane Way
Franklin City, Franklin 33117

July 20, 2020

To whom it may concern:

I write this letter in support of Alice Lindgren's petition for a U visa. I received my PhD in psychological counseling from Olympia State University. I am a licensed psychologist in both Olympia and Franklin. I maintain a solo practice through which I provide one-on-one counseling. While I work with a wide variety of patients, I specialize in providing counseling to trauma victims.

I have provided Alice individual counseling since March 2020, approximately one month after she was robbed near the University of Franklin campus.

Alice acknowledged that she had mild anxiety related to her performance in her architecture graduate program before this incident. Since the robbery, Alice suffers from intense anxious and fearful feelings and thoughts, increasing her isolation. As an immigrant to this country, she is far from her family and friends in Sweden.

Alice also suffers from post-traumatic stress disorder (PTSD), a disorder that develops in some people who have experienced a shocking or dangerous event. Alice experiences flashbacks, bad dreams, and frightening thoughts. She also has difficulty sleeping and is easily startled. She has withdrawn from her friends in the architecture program, and she and her long-term boyfriend broke up. These all support my diagnosis of PTSD.

I find Alice's account of her experience and her emotions to be credible. It is my opinion that her current intense anxiety and PTSD are directly related to the robbery. Please feel free to contact me if you have any questions.

Very truly yours,

A handwritten signature in black ink that reads "Charles Einhorn". The signature is written in a cursive, flowing style.

Dr. Charles Einhorn

July 2020
MPT-1 Library

In re Alice Lindgren

Excerpts from Immigration and Nationality Act (INA) § 101(a)(15)(U)

(i) [An alien qualifies for a U Visa if]:

(I) the alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity;

(II) the alien possesses information concerning qualifying criminal activity;

(III) the alien has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, or to other Federal, State, or local authorities investigating or prosecuting qualifying criminal activity; and

(IV) the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States

. . .

(iii) the qualifying criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: . . . felonious assault

8 C.F.R. § 214.14
Alien Victims of Certain Qualifying Criminal Activity

(a) Definitions. As used in this section, the term:

...

(5) Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.

...

(8) Physical or mental abuse means injury or harm to the victim's physical person, or harm to or impairment of the emotional or psychological soundness of the victim.

(9) Qualifying crime or qualifying criminal activity includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States:

... felonious assault

The term "any similar activity" refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities.

...

(12) U nonimmigrant status certification means Form I-918, Supplement B, "U Nonimmigrant Status Certification," which confirms that the petitioner has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.

(b) Eligibility. An alien is eligible for U-1 nonimmigrant status if he or she demonstrates all of the following:

(1) The alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. Whether abuse is substantial is based on a number of factors, including but not limited to: The nature of the injury inflicted or suffered; the severity of the perpetrator's conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No single factor is a prerequisite to establish that the abuse suffered was substantial. Also, the existence of one or more of the factors automatically does not create a presumption that the abuse suffered was

substantial. A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level;

(2) The alien possesses credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or her petition is based. The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity;

(3) The alien has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based; and

(4) The qualifying criminal activity occurred in the United States

(c) Application procedures for U nonimmigrant status:

(1) Filing a petition. USCIS has sole jurisdiction over all petitions for U nonimmigrant status. An alien seeking U-1 nonimmigrant status must submit, by mail, Form I-918, "Petition for U Nonimmigrant Status" and initial evidence to USCIS in accordance with this paragraph and the instructions to Form I-918.

(2) Initial evidence. Form I-918 must include the following initial evidence:

(i) Form I-918, Supplement B, "U Nonimmigrant Status Certification," signed by a certifying official within the six months immediately preceding the filing of Form I-918. The certification must state that the agency is a Federal, State, or local law enforcement agency, or prosecutor, judge or other authority, that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity; the applicant has been a victim of qualifying criminal activity that the certifying official's agency is investigating or prosecuting; the petitioner possesses information concerning the qualifying criminal activity of which he or she has been a victim; the petitioner has been, is being, or is likely to be helpful to an investigation or prosecution of that qualifying criminal activity; and the qualifying criminal activity violated U.S. law, or occurred in the United States

(ii) Any additional evidence that the petitioner wants USCIS to consider to establish that: the petitioner is a victim of qualifying criminal activity; the petitioner has suffered

substantial physical or mental abuse as a result of being a victim of qualifying criminal activity; the petitioner possesses information establishing that he or she has knowledge of the details concerning the qualifying criminal activity of which he or she was a victim and upon which his or her application is based; the petitioner has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement agency, prosecutor, or authority, or Federal or State judge, investigating or prosecuting the criminal activity of which the petitioner is a victim; or the criminal activity is qualifying and occurred in the United States ; and

(iii) A signed statement by the petitioner describing the facts of the victimization. The statement also may include information supporting any of the eligibility requirements set out in paragraph (b) of this section.

Excerpts from Franklin Penal Code

§ 22 Aggravated Assault

(a) A person commits an offense if the person:

- (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly; or
- (2) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

(b) An offense under this section is a felony

§ 29 Robbery

(a) A person commits an offense if, in the course of committing theft with intent to obtain or maintain control of the property, the person:

- (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
- (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

(b) An offense under this section is a felony

July 2020
MPT-1
Drafters' Point Sheet

In re Alice Lindgren

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

In re Alice Lindgren

DRAFTERS' POINT SHEET

In this performance test, the examinee works for Neighborhood Immigration Services (NIS), a nonprofit immigration law office, which is representing Alice Lindgren. Lindgren, a native and citizen of Sweden, was robbed about six months ago. She bruised her wrist and suffered abrasions on her face in the attack. She also suffers from PTSD as a result of the robbery. She assisted the police and the prosecution with the investigation and prosecution of the crime. NIS has determined that Lindgren, whose student visa has lapsed, likely qualifies for a U visa. U visas are meant to encourage immigrant victims of crime, who might otherwise be afraid to interact with law enforcement, to report crime and assist in the investigation or prosecution of crime. The examinee's task is to write a persuasive cover letter to United States Citizenship and Immigration Services (USCIS) on behalf of Lindgren's petition for a U visa.

The File contains (1) the instructional memorandum from the supervising attorney, (2) office guidelines for cover letters to USCIS, (3) Lindgren's affidavit, (4) the police report of the incident, (5) a file memorandum on the case's status, (6) a printout from the Crimmigration Experts listserv providing guidance on arguing that robbery is a qualifying crime because it is similar to felonious assault, and (7) a letter from Lindgren's psychologist. The Library contains excerpts from the Immigration and Nationality Act (INA) § 101(a)(15)(U), Title 8 of the Code of Federal Regulations § 214.14, and excerpts from the Franklin Penal Code (FPC).

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee's task is to draft a persuasive cover letter to USCIS that will accompany Lindgren's U visa petition and supporting materials. This is a formal business letter to USCIS that also functions as a persuasive "brief" arguing Lindgren's eligibility for a U visa by showing that she meets all the eligibility requirements.

Format of the Letter

The examinee is directed to follow NIS's conventions in drafting cover letters to USCIS:

- Date
- Recipient's Address: U visa petitions are sent to the Franklin Service Center, 119 Exchange Street, Franklin City, FR 33705.
- Subject: the client's name, the client's alien number, or "A number" (if he or she has one), and the number and name of the form or petition being filed. Lindgren's A number, 21-454-988, is indicated on her affidavit.
- Greeting: Address the letter to "Dear USCIS Officer:"
- Body (see below)
- Closing: Tell the immigration officer to contact you with questions. Offer thanks to USCIS for its consideration of the application or petition.
- Signature: "Elizabeth Saylor, Supervising Attorney"
- Copies- cc: [client name]
- Enclosures: Type "Enclosure" or "Enclosures" as appropriate.

Body of the Letter

The instructional memorandum and the cover letter memorandum contain the following guidelines for the body of the letter:

- Begin with the purpose of the letter and state that NIS represents the client in this matter.
- "Brief" the client's eligibility. For each eligibility requirement, state the law and then argue how the facts meet that requirement. Do not include a separate statement of facts but instead use the facts when arguing that the client satisfies each legal requirement. Use a heading for each requirement that clearly identifies the immigration requirement being addressed.
- Provide the relevant legal citations from the INA, Title 8 C.F.R., etc.
- Do not cite any document or evidence that proves the underlying facts because a paralegal will prepare an index of supporting documentary evidence.

Attorney Saylor attempted to persuade Officer Sanders to certify that Lindgren was a victim of aggravated assault in addition to robbery, but he refused on the ground that the defendant was only prosecuted for robbery. This memorandum alerts examinees as to one of the more challenging tasks of this item—arguing that robbery is a similar crime to felonious assault.

II. FACTS

- Alice Lindgren is a 24-year-old native and citizen of Sweden.
- She came to the United States on an F-1 student visa to study in an architecture graduate program at the University of Franklin and to be with her American boyfriend.
- She has not left the United States since she arrived. Her F-1 visa has lapsed.
- On February 5, 2020, around 11:00 p.m., she was robbed across from the campus after she left the school's architecture studio to get a snack at a coffee shop across the street.
- As she crossed the street, Lindgren heard footsteps running up behind her. She turned to see a man running toward her. She started to run but tripped. She fell on the concrete, skinning her face. While she was on the ground, the man pulled her navy blue backpack off her back. The backpack contained her wallet, \$80 in cash, an iPhone, a MacBook Air, and a red cardigan. Lindgren screamed during the attack. The man told her to shut up.
- Lindgren heard the man's footsteps as he ran to jump into the backseat of a car that sped off. She memorized the first three numbers of the car's license plate.
- Lindgren bruised her wrist when trying to catch herself during the fall. She also sustained multiple facial contusions from falling on the concrete. Gravel was embedded in the wounds.
- She returned to the architecture studio where her classmates called the campus police, who then took Lindgren to the 12th Precinct of the Franklin City Police Department.
- Lindgren spent about an hour at the precinct, telling the officers everything that had happened. She described the assailant as a Caucasian middle-aged man with a salt-and-pepper beard, a black jacket, and running shoes. She also described the getaway car as an older, rusted green Toyota Camry, with a license plate number beginning with 406.
- She still had blood on her face when she visited the precinct.
- She saw a doctor the next day. The doctor cleaned and bandaged her facial wounds and diagnosed her with a bruised wrist.
- The assailant was identified a month later when he tried to pawn Lindgren's laptop. Both he and his car matched the descriptions provided by Lindgren.
- The detective asked Lindgren to come to the precinct to see if she could identify the man in a lineup, but she refused because she felt she could not bear to see the man again.

- The man was prosecuted for robbery, and the case went to trial. Lindgren met with the assistant district attorney before trial and then testified at trial even though she was very afraid. She identified the defendant as her attacker. The defendant was convicted.
- Lindgren has suffered a lot of emotional problems since the incident. She is afraid to go out at night. She has trouble sleeping and has nightmares. She is afraid to go to campus and has dropped out of the architecture program.
- Since March 2020, Lindgren has been receiving counseling from psychologist Dr. Charles Einhorn, who specializes in providing counseling for trauma victims.
- Dr. Einhorn believes that Lindgren suffers intense anxious and fearful feelings and thoughts, increasing her isolation. She has withdrawn from classmates; she and her boyfriend broke up.
- Dr. Einhorn also believes that Lindgren suffers from post-traumatic stress disorder (PTSD), which develops in some people who have experienced a shocking or dangerous event. Lindgren experiences flashbacks, bad dreams, and frightening thoughts. She has difficulty sleeping and is easily startled.
- Lindgren has acknowledged to Dr. Einhorn that she experienced mild anxiety related to her performance in the architecture graduate program.
- Dr. Einhorn believes that Lindgren’s account of her experience and emotions is credible and that her current intense anxiety and PTSD are directly related to the robbery.
- On April 26, 2020, Franklin City Police Department Officer James Sanders signed Form I-918 Supplement B “U Nonimmigrant Status Certification” indicating that Lindgren was helpful in the investigation and prosecution of the robbery.
- Lindgren would like to remain in the United States and resume her studies at the university.

LAW AND ANALYSIS

- **Substantial Physical or Mental Abuse**
 - Relevant Law
 - [An alien qualifies for a U Visa if]: the alien has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity. INA § 101(a)(15)(U)(i)(I); 8 C.F.R. § 214.14(b)(1)

- Physical or mental abuse means injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim. 8 C.F.R. § 214.14(a)(8)
- Whether abuse is substantial is based on a number of factors, including but not limited to the nature of the injury inflicted or suffered; the severity of the perpetrator’s conduct; the severity of the harm suffered; the duration of the infliction of the harm; and the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. No one factor is required to show that the abuse suffered was substantial. Also, the existence of one or more of the factors does not create a presumption that the abuse suffered was substantial. A series of acts taken together may constitute substantial physical or mental abuse even where no single act suffices. 8 C.F.R. § 214.14(b)(1)
- Argument
 - The examinee should argue that Lindgren has suffered substantial physical or mental abuse as a result of the robbery. While Lindgren experienced both physical and mental harm, the examinee needs to make the case that this harm was *substantial* to meet the legal requirements. “Physical or mental abuse” is defined as “injury or harm to the victim’s physical person, or harm to or impairment of the emotional or psychological soundness of the victim.”
 - There was harm to Lindgren’s physical person. Lindgren received multiple facial contusions after falling on the sidewalk. Her face was bleeding when she went back to the architecture studio, and Officer Sanders noted that Lindgren had “multiple contusions and bleeding on left side of face.” Gravel was embedded in her wounds, and her wrist was bruised as a result of the robbery.
 - There continues to be harm to Lindgren’s emotional and psychological soundness. Lindgren has been seeing Dr. Einhorn for counseling since March 2020. She has intense anxious and fearful feelings and thoughts, which have increased her isolation. She dropped out of her graduate program as a result of the robbery. She has emotionally distanced herself from her classmates, and she and her American boyfriend broke up. Lindgren also suffers from diagnosed PTSD as a result of the robbery. She is afraid to

go out at night. She experiences flashbacks and frightening thoughts. She has difficulty sleeping, has nightmares, and is easily startled.

- The examinee should apply the factors from 8 C.F.R. § 214.14(b)(1) to argue that the abuse is substantial.
 - Severity of the perpetrator’s conduct. The perpetrator’s conduct was arguably severe. He chased and robbed a young woman who was alone late at night, pulling her backpack off. He told Lindgren to “shut up.”
 - Severity of the harm suffered. The emotional harm to Lindgren is arguably severe. She was visibly upset and cried during her interview with officers on February 6, 2020. She now suffers intense anxious and fearful feelings and thoughts. She has distanced herself from classmates, she dropped out of the architecture program, and she and her boyfriend broke up. She also suffers from PTSD as result of the robbery, which causes her to experience flashbacks and frightening thoughts and to be easily startled. She has nightmares and sleeps poorly.
 - Duration of the infliction of the harm. The duration of the emotional harm Lindgren has suffered could be argued to be a factor that shows that the abuse is substantial. Lindgren has already experienced emotional harm in the months since the incident with no indication that she is improving.
 - Extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions. Lindgren already suffered from mild anxiety related to her performance in her architecture graduate program. The robbery has aggravated this pre-existing condition such that she now suffers from intense anxiety and PTSD. Again, there is no indication that her mental condition is improving.
- **Possesses Information Concerning Criminal Activity**
 - Relevant Law
 - [An alien qualifies for a U Visa if]: the alien possesses information concerning qualifying criminal activity. INA § 101(a)(15)(U)(i)(II)
 - An alien is eligible for U-1 nonimmigrant status if he or she demonstrates that he or she possesses credible and reliable information establishing that he or she has knowledge of the details concerning the qualifying criminal activity upon which his or

her petition is based. The alien must possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity. 8 C.F.R. § 214.14(b)(2)

- Argument

- Lindgren possesses information concerning the robbery. She experienced the robbery firsthand. She was aware of what was happening throughout, including falling to the ground, having her backpack and its contents (wallet, \$80 cash, iPhone, MacBook Air, cardigan) stolen, and seeing the assailant run away and jump into a getaway car. She provided the police with a description of the perpetrator and the getaway car, including the first three digits of the license plate number, and identified the perpetrator in court.
- The information Lindgren has is credible and reliable. Dr. Charles Einhorn attests in his supporting letter that he finds her account of her experiences and her emotions to be credible. Additionally, the person who attempted to pawn her stolen laptop fit the description she provided to the police and owned a car that matched the description that Lindgren provided.
- Franklin City Police Department Officer James Sanders, the certifying official, determined that Lindgren assisted in the investigation and prosecution of the robbery based on the specific facts she provided. This determination is evident because Sanders signed a Form I-918 Supplement B “U Nonimmigrant Status Certification.”

- **Has Been Helpful, Is Being Helpful, or Is Likely to Be Helpful in Investigating or Prosecuting the Qualifying Crime**

- Relevant Law

- [An alien qualifies for a U Visa if]: the alien has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, . . . , or to other Federal, State, or local authorities investigating or prosecuting qualifying criminal activity. INA § 101(a)(15)(U)(i)(III)
- An alien is eligible for U-1 nonimmigrant status if he or she demonstrates that he or she has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based. 8 C.F.R. § 214.14(b)(3)

- Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity. 8 C.F.R. § 214.14(a)(5)
- U nonimmigrant status certification means Form I-918, Supplement B, “U Nonimmigrant Status Certification,” which confirms that the petitioner crime victim has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity. 8 C.F.R. § 214.14(a)(12)
- Form I-918, Supplement B, “U Nonimmigrant Status Certification,” must have been signed by a certifying official within the six months immediately preceding the filing of Form I-918. 8 C.F.R. § 214.14(c)(2)(i)
- Argument
 - For the most part, Lindgren has been helpful to a local law enforcement agency investigating qualifying criminal activity. In the early morning hours of February 6, 2020, right after the robbery, Lindgren went to the 12th Precinct to make a report. She stayed at the precinct for about an hour, telling officers Sanders and Wong “everything [she] knew” about the robbery. She provided a description of the perpetrator and the getaway car and the first three digits of the license plate number.
 - Lindgren has also been helpful to a state prosecutor in prosecuting qualifying criminal activity. She met with the assistant district attorney about the robbery before the trial. She “stoic[ally]” testified at the trial and identified the defendant as her assailant, even though she was afraid.
 - Lindgren’s helpfulness ultimately aided law enforcement in identifying and prosecuting the defendant. A man fitting the description she provided (a middle-aged Caucasian man with a salt-and-pepper beard) who owned a car similar to the one she saw at the crime scene (an older rusty green Toyota Camry) attempted to pawn the laptop that was in Lindgren’s stolen backpack. Aided by Lindgren’s description, the police and prosecutor were able to identify and successfully prosecute the defendant.
 - Examinees should acknowledge that despite the detective’s request, Lindgren refused to attend a lineup including the defendant. Examinees should argue that even though she did not participate in the lineup, she was helpful overall.

- Lindgren has a Form I-918 Supplement B “U Nonimmigrant Status Certification,” signed by Officer Sanders, confirming that she was helpful in the investigation and prosecution of the robbery. This form was signed on April 26, 2020, which is within the six-month deadline set forth in 8 C.F.R. § 214.14(c)(2)(i).
- **Criminal Activity Violated the Laws of and Occurred in the United States**
 - Relevant Law
 - [An alien qualifies for a U Visa if]: the criminal activity . . . violated the laws of the United States or occurred in the United States. INA § 101(a)(15)(U)(i)(IV)
 - The qualifying criminal activity must have occurred in the United States. 8 C.F.R. § 214.14(b)(4)
 - Argument
 - The criminal activity, stealing Lindgren’s backpack and its contents, violated Franklin Penal Code § 29 Robbery. The jury found the defendant guilty of robbery and thus that he violated the law.
 - This crime occurred in Franklin City, Franklin, which is in the United States.
- **Qualifying Crime**
 - Relevant Law
 - [T]he qualifying criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: . . . felonious assault INA § 101(a)(15)(U)(iii)
 - Qualifying crime or qualifying criminal activity includes one or more of the following or any similar activities in violation of Federal, State or local criminal law of the United States: . . . felonious assault 8 C.F.R. § 214.14(a)(9)
 - The term “any similar activity” refers to criminal offenses in which the nature and elements of the offenses are substantially similar to the statutorily enumerated list of criminal activities. 8 C.F.R. § 214.14(a)(9)
 - The Crimmigration Experts Forum listserv printout provides guidance about whether robbery can be considered a qualifying crime as a “similar activity” to felonious assault. While not authoritative, this discussion can be used to formulate successful arguments that Lindgren meets the qualifying crime requirement, especially as USCIS has not provided any guidance on the issue. Through the listserv dialogue, we learn that (a) it

is extremely difficult to successfully argue “similar crimes”; (b) you must argue that the nature and elements of robbery are similar to the nature and elements of felonious assault, with “nature of the crime” meaning the inherent character of the crime as defined by the statute; (c) the proper inquiry is not an analysis of the facts but a comparison of the nature and elements of the crime that is investigated or prosecuted and the enumerated crime; (d) some robbery cases have been approved as felonious assault qualifying crimes; (e) in Olympia and other states, robbery cases have not been approved as felonious assault qualifying crimes because the elements for robbery and felonious assault are too different.

- FPC § 22, Aggravated Assault: (a) A person commits an offense if the person: (1) attempts to cause serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly; or (2) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon. (b) An offense under this section is a felony.
- FPC § 29, Robbery: (a) A person commits an offense if, in the course of committing theft with intent to obtain or maintain control of the property, the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death. (b) An offense under this section is a felony.
- Argument
 - Robbery is not an enumerated qualifying crime. Thus, the examinee needs to argue that Robbery under FPC § 29 is a qualifying crime as a “similar activity” to felonious assault, which in Franklin is Aggravated Assault under FPC § 22.
 - Note that Aggravated Assault would constitute “felonious assault” under the INA and 8 C.F.R. because FPC § 22(b) indicates that Aggravated Assault is a felony.
 - To show that Robbery is a “similar activity” to Aggravated Assault in Franklin, the examinee must argue that the nature and elements of Robbery are substantially similar to the nature and elements of Aggravated Assault.
 - The elements of the crimes of Robbery and Aggravated Assault are similar. The language used in the elements under FPC § 22(a)(1) and FPC § 29(a)(1) is very similar. FPC § 22(a)(1) (Aggravated Assault) requires that the offender “attempts to cause

serious bodily injury to another, or causes such injury intentionally, knowingly, or recklessly.” FPC § 29(a)(1) (Robbery) requires that the offender “intentionally, knowingly, or recklessly causes bodily injury to another.” Criminal liability arises under both provisions for intentional, knowing, or reckless conduct that causes bodily injury to another person. Both sections use the identical language “intentionally, knowingly, or recklessly.” FPC § 22(a)(1) (Aggravated Assault) refers to “causes serious bodily injury to another,” and FPC § 29(a)(1) (Robbery) refers to “causes bodily injury to another.” Both sections refer to causing bodily injury to another.

- The examinee should argue that the nature of Robbery and Aggravated Assault is similar. Even though FPC § 22(a)(1) (Aggravated Assault) requires “serious bodily injury” and FPC § 29(a)(1) (Robbery) requires only “bodily injury,” both sections seek to deter and punish conduct causing bodily injury. Similarly, both sections seek to deter and hold accountable those who commit or attempt to commit intentional, knowing, or reckless acts that cause bodily injury.
- The examinee should address the fact that in Franklin, Robbery requires “committing theft with intent to obtain or maintain control of the property,” while Aggravated Assault has no requirement related to theft. Additionally, an astute examinee might recognize that Aggravated Assault includes an attempt to intentionally, knowingly, or recklessly cause injury to another while Robbery does not include attempted acts. The examinee should argue that nonetheless, the elements and nature of the crimes of Robbery and Aggravated Assault are substantially similar under the law of Franklin, and thus Robbery is a qualifying crime under INA § 101(a)(15)(U)(iii) and 8 C.F.R. § 214.14(a)(9).
- Excellent examinees will indicate that both FPC § 22 and FPC § 29 have alternative elements, meaning that (1) or (2) can apply but both are not required. Therefore, a comparison can be made between just part (1) or (2) of each statutory provision.
- In keeping with the guidance provided by the Crimmigration Experts listserv, the examinee should not address the underlying facts of the robbery of Lindgren or any facts dealing with Robbery or Aggravated Assault.

July 2020
MPT-2 File

Fun4Kids Terms of Service Agreement

Weiss & Briotti LLP
Attorneys at Law
14 Charles Street
Franklin City, Franklin 33800

MEMORANDUM

TO: Examinee
FROM: Tony Briotti
DATE: July 28, 2020
RE: Terms of Service Agreement for Fun4Kids

Our client, Fun4Kids Inc., is planning to start a commercial internet service designed to provide educational games for children ages 11 through 14. Its owner, Jan Morrison, is aware that there are both federal and Franklin state laws and regulations that affect commercial online services designed for children. She has asked me to draft the necessary “terms of service” agreement that will appear on the service and will allow the children to use it. Before I can do so, I need your assistance in identifying and analyzing the relevant issues, and your recommendations as to how to deal with them. I am attaching a transcript of my interview with Ms. Morrison, as well as other materials.

Please prepare a memorandum to me (i) identifying and analyzing the relevant issues discussed in the client interview and (ii) making recommendations as to how to address those issues. Use the following format for each separate issue:

Issue: [Insert a brief statement of each issue to be addressed.]

Analysis and Recommendation: [State your recommendation for addressing the issue and your reasons for making that recommendation, including references to applicable law, regulations, and other materials, and how they apply to the facts.]

Do not draft the terms of service agreement. I will do that after reviewing the analysis and recommendations in your memorandum.

Transcript of Interview with Jan Morrison, July 27, 2020

Briotti: Hello, Jan, great to see you. What can we do for you?

Morrison: Hi, Tony. Here's how you can help. We're looking ahead to the launch of our Fun4Kids commercial online service—our website—and related mobile app, which will offer educational games for kids in their preteen and early teenage years. We've put a lot of effort and expense into research on what approaches can best educate kids that age, and into designing the service to appeal to kids ages 11 through 14. I know that there are laws about commercial online services that are used by kids. Do they apply to us? If they do, we want to be sure that we're in compliance with them.

Briotti: Yes, there are such laws and regulations, and they would apply to your website. That's important, because failure to comply can be very expensive as well as bad for a business's reputation. Tell me what your other concerns are.

Morrison: Well, to begin with, we're not sure what kind of terms of service agreement we need to have in place. The easiest solution for us would be to somehow make it possible that the use of the service itself signifies agreement with any terms of service we'd have in place—what I know is called a “browsewrap” agreement. If that's not possible, we'd want something simple like a click-through “clickwrap” agreement where the user clicks an “I Agree” button that indicates agreement with those terms.

Briotti: That's the first issue that we'll look at and make a recommendation to you.

Morrison: We also don't know if we need the kids' parents to consent to the use, and if we do, how we go about getting it.

Briotti: We'll look at that issue as well. It involves both federal and Franklin state law. How do you plan to make this service a profitable business?

Morrison: We've concluded that there is a possibility of good commercial success. We plan to earn revenue from the website in two ways. First, we're going to charge a small monthly overall fee for the service's use, as well as a fee for each different game used. That means we've got to allow for payment by credit card.

Briotti: You should be aware that how you do that could raise a significant issue, which will have to be carefully addressed. For example, the Federal Trade Commission has required Persimmon Inc., an online service for children, to pay many millions of dollars in restitution for credit card charges made on kids' apps that the FTC said

didn't comply with the law's requirements. We'll have to take the FTC position into account when we look at whether credit cards may be used and what safeguards you'll have to employ for their use.

Morrison: I certainly don't want to risk that sort of result—I trust you'll tell me how to avoid that risk.

Briotti: We'll add that to the list.

Morrison: Okay. The second source of revenue will be the sale of advertising geared to kids on the site. As you know, web-based advertising can be lucrative because of the ability to target individual users of websites with advertising keyed to their particular needs. So we plan to collect information about the users of the service—we're thinking of the user's name, home address, gender, age, and email address—and provide that information to advertisers.

Briotti: What's the basis for your asking for that information?

Morrison: We need the user's name because the games are personalized for the kids, and their names are used within the game. For example, in a math game, the game visual would say "Hi, Johnny, let's work on some math problems." Same thing with gender and age—some games are geared to research on whether boys or girls respond better to certain lesson approaches, and many of the educational subjects are age-specific.

Briotti: What about home and email addresses?

Morrison: That information will help sell it to the advertisers; it's not really needed for the games themselves.

Briotti: I understand. We'll take a look at that issue as well. You should be aware that there is one more issue to consider: there are state limitations on online advertising to minors here in Franklin, and we'll have to look at that, too. We'll examine all these issues and give you our recommendations and the reasons for them. Once we've consulted on that and you give us the go-ahead, we'll draft the terms of service agreement for you.

Federal Trade Commission Press Release

Persimmon Inc. Will Provide Full Consumer Refunds of At Least \$45 Million to Settle FTC Complaint It Charged for Kids' Online Purchases Without Parental Consent

Company Will Also Modify Its Billing Practices Under FTC Settlement

For Release – May 12, 2018

Persimmon Inc. has agreed to provide full refunds to consumers, paying a minimum of \$45 million, to settle a Federal Trade Commission complaint that the company billed consumers for millions of dollars of charges incurred by children in kids' mobile apps without their parents' consent. Under the terms of the settlement with the FTC, Persimmon will also be required to change its billing practices to ensure that it has obtained express informed consent from parents before charging them for items sold in mobile apps.

The FTC's complaint alleges that Persimmon acted unlawfully by failing to tell parents that entering a password finalizes pending purchases and permits unlimited purchases on a child's account for 15 minutes afterward. The complaint also alleges that Persimmon's online terms of service agreement did not inform parents of either result.

The settlement requires Persimmon to modify its terms of service agreement to ensure that it obtains parents' express informed consent before finalizing purchases and before opening a window for unlimited purchases. Parents must also have the option to withdraw their consent at any time.

July 2020
MPT-2 Library

Fun4Kids Terms of Service Agreement

Excerpts from Children’s Online Privacy Protection Act (COPPA)

15 U.S.C. § 6501 *et seq.*

§ 6501. Definitions

In this chapter:

(1) Child

The term “child” means an individual under the age of 13.

...

(4) Disclosure

The term “disclosure” means, with respect to personal information,

(A) the release of personal information collected from a child in identifiable form by [a website] operator for any purpose, except where such information is provided to a person other than the operator who provides support for the internal operations of the website and does not disclose or use that information for any other purpose; and

(B) making personal information collected from a child by a website or online service directed to children, or with actual knowledge that such information was collected from a child, publicly available in identifiable form, by any means

...

(7) Parent

The term “parent” includes a legal guardian.

(8) Personal information

The term “personal information” means individually identifiable information about an individual collected online, including

(A) a first and last name;

(B) a home or other physical address including street name and name of a city or town;

(C) an email address;

... or

(G) information concerning the child or the parents of that child that the website collects online from the child

(9) Verifiable parental consent

The term “verifiable parental consent” means any reasonable effort (taking into consideration available technology), including a request for authorization for future

collection, use, and disclosure described in the notice, to ensure that a parent of a child receives notice of the operator's personal information collection, use, and disclosure practices, and authorizes the collection, use, and disclosure, as applicable, of personal information and the subsequent use of that information before that information is collected from that child.

...

§ 6502. Regulation of unfair and deceptive acts and practices in connection with collection and use of personal information from and about children on the Internet

(a) Acts prohibited

(1) In general

It is unlawful for an operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting personal information from a child, to collect personal information from a child in a manner that violates the [Federal Trade Commission] regulations [authorized by this Act]

Excerpts from Federal Trade Commission Regulations

16 C.F.R. §§ 312.3–312.7

§ 312.3 Regulation of unfair or deceptive acts or practices in connection with the collection, use, and/or disclosure of personal information from and about children on the Internet.

General requirements. It shall be unlawful for any operator of a website or online service directed to children, or any operator that has actual knowledge that it is collecting or maintaining personal information from a child, to collect personal information from a child in a manner that violates the regulations prescribed under this part. Generally, under this part, an operator must:

- (a) Provide notice on the website or online service of what information it collects from children, how it uses such information, and its disclosure practices for such information (§ 312.4(b));
- (b) Obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children (§ 312.5);
- (c) Provide a reasonable means for a parent to review the personal information collected from a child and to refuse to permit its further use or maintenance (§ 312.6);
- (d) Not condition a child's participation in a game, the offering of a prize, or another activity on the child[']s disclosing more personal information than is reasonably necessary to participate in such activity (§ 312.7);

§ 312.4 Notice.

- (a) General principles of notice. It shall be the obligation of the operator to provide notice and obtain verifiable parental consent prior to collecting, using, or disclosing personal information from children. Such notice must be clearly and understandably written, complete, and must contain no unrelated, confusing, or contradictory materials.
- (b) Direct notice to the parent. An operator must make reasonable efforts, taking into account available technology, to ensure that a parent of a child receives direct notice of the operator's practices with regard to the collection, use, or disclosure of personal information from children, including notice of any material change in the collection, use, or disclosure practices to which the parent has previously consented.
- (c) Content of the direct notice to the parent—
 - (1) Content of the direct notice to the parent This direct notice shall set forth:

- (i) That the operator has collected the parent's online contact information from the child, and, if such is the case, the name of the child or the parent, in order to obtain the parent's consent;
- (ii) That the parent's consent is required for the collection, use, or disclosure of such information, and that the operator will not collect, use, or disclose any personal information from the child if the parent does not provide such consent;
- (iii) The additional items of personal information the operator intends to collect from the child, or the potential opportunities for the disclosure of personal information, should the parent provide consent;
- (iv) A hyperlink to the operator's online notice of its information practices . . . ;
- (v) The means by which the parent can provide verifiable consent to the collection, use, and disclosure of the information; and
- (vi) That if the parent does not provide consent within a reasonable time from the date the direct notice was sent, the operator will delete the parent's online contact information from its records.

...

§ 312.5 Parental consent.

(a) General requirements.

(1) An operator is required to obtain verifiable parental consent before any collection, use, or disclosure of personal information from children, including consent to any material change in the collection, use, or disclosure practices to which the parent has previously consented.

(2) An operator must give the parent the option to consent to the collection and use of the child's personal information without consenting to disclosure of his or her personal information to third parties.

(b) Methods for verifiable parental consent.

(1) An operator must make reasonable efforts to obtain verifiable parental consent, taking into consideration available technology. Any method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent.

(2) Existing methods to obtain verifiable parental consent that satisfy the requirements of this paragraph include:

- (i) Providing a consent form to be signed by the parent and returned to the operator by postal mail, facsimile, or electronic scan;
 - (ii) Requiring a parent, in connection with a monetary transaction, to use a credit card, debit card, or other online payment system that provides notification of each discrete transaction to the primary account holder;
 - (iii) Having a parent call a toll-free telephone number staffed by trained personnel;
 - (iv) Having a parent connect to trained personnel via videoconference;
 - (v) Verifying a parent's identity by checking a form of government-issued identification against databases of such information, where the parent's identification is deleted by the operator from its records promptly after such verification is complete;
- ...

§ 312.6 Right of parent to review personal information provided by a child.

(a) Upon request of a parent whose child has provided personal information to a website or online service, the operator of that website or online service is required to provide to that parent the following:

- (1) A description of the specific types or categories of personal information collected from children by the operator, such as name, address, telephone number, email address, hobbies, and extracurricular activities;
- (2) The opportunity at any time to refuse to permit the operator's further use or future online collection of personal information from that child, and to direct the operator to delete the child's personal information; and
- (3) Notwithstanding any other provision of law, a means of reviewing any personal information collected from the child. The means employed by the operator to carry out this provision must:
 - (i) Ensure that the requestor is a parent of that child, taking into account available technology; and
 - (ii) Not be unduly burdensome to the parent.

...

§ 312.7 Prohibition against conditioning a child's participation on collection of personal information.

An operator is prohibited from conditioning a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity.

Excerpts from Franklin Civil Code § 200.1

§ 200.1 Disaffirmance of Contracts

(a) A contract made by a person after he or she has attained the age of 18 years may not be disaffirmed by himself or herself on the ground of infancy. A contract made by a person before he or she has attained the age of 18 years may be disaffirmed by that person's parent or guardian, except as provided in this section.

(b) [Exceptions omitted]

Excerpts from Franklin Children's Protection on the Internet Act (CPIA)

§ 18 Marketing and advertising

(a) An operator of an Internet website, online service, online application, or mobile application directed to minors shall not market or advertise a product or service described in subsection (h) on its Internet website, online service, online application, or mobile application directed to minors. A "minor" is an individual under the age of 18 years.

...

(h) The marketing and advertising restrictions described in subsection (a) shall apply to the following products and services as they are defined under state law:

- (1) Alcoholic beverages
- (2) Firearms, handguns, or ammunition
- (3) Cigarettes or other tobacco products
- (4) Dangerous fireworks
- (5) Tickets or shares in a lottery game
- (6) Permanent tattoos
- (7) Drug paraphernalia
- (8) Obscene matter

...

Sampson Scientific Foundation, Inc. v. Wessel
Franklin Court of Appeal (2017)

We are asked to determine if a particular type of online “terms of service” agreement is binding on the users of an Internet website. At the outset, we note that a contract is no less a contract simply because it is entered into via a computer. That is to say, agreements entered into via computer technology may be binding contracts, if the principles of contract law are followed.

The record shows that plaintiff Sampson Scientific Foundation conducts research and development in cutting-edge technologies. It operates a website, to which access is limited to individuals vetted by Sampson for their scientific and academic credentials. Basically, Sampson only allows those whom it trusts and who have “impeccable” reputations in the sciences and the academy to access its website. It takes this step in part because it deems much of the information it posts on its website to be confidential. Hence, it incorporates a “terms of service” agreement on the website, to which all who are given access to the website must agree.

It does so by employing a “clickwrap” agreement. Each time an individual who has been cleared to access Sampson’s website logs on to it, a window appears asking the user to “Agree” or “Disagree” to the terms of service by clicking on an appropriate “button” indicator on the window; before making that choice, the user may access and review those terms (the full text of the agreement) by clicking a link that brings up the text. One term contained in the terms of service agreement specifies that the user will not disclose the substance of the information on the website to third parties.

Defendant Frederick Wessel is an associate professor of engineering at Franklin State University, whose academic specialty is rocket propulsion. He was granted access to the Sampson website in 2013, after being vetted and approved by Sampson. In 2014, Sampson posted some information on its website about research it was undertaking on new formulas for rocket fuels. Wessel accessed the website, printed out the information, and supplied it to Astrodyne Industries Inc., a commercial aerospace business, with whom Wessel had a paid consulting relationship. By means unimportant here, Sampson learned that Astrodyne had received the confidential information from Wessel. Sampson sued for breach of contract and sought significant damages. The trial court found for Sampson, and this appeal followed.

Wessel does not contest the facts as found by the trial court and as set forth above. Rather, he claims an error of law. Specifically, he argues that the “clickwrap” agreement is not a binding

agreement at all. He relies on our decision in *Hartson v. Hobart* (Fr. Ct. App. 2011). There, the validity of a “browsewrap” agreement for a commercial loan service was at issue. “Browsewrap” agreements typically have links to their terms of service, but the user’s consent is deemed given by the mere use of the website, without the need to click an “Agree” or “Disagree” button. We held that such agreements are not necessarily binding, but rather depend on fact-specific questions. We said: “Because no affirmative action is required by the website user to agree to the terms of a contract other than his or her use of the website, the determination of the validity of a browsewrap contract depends on whether the user has actual or constructive knowledge of a website’s terms and conditions. A court may be willing to overlook the utter absence of assent only when there are sufficient reasons to believe that the website user is aware of the website owner’s terms.” We concluded that there was no evidence that the user had actual knowledge of and hence assented to the agreement. We further noted that the overwhelming majority of users of the service were unsophisticated in the world of finance, let alone in the details of commercial loan agreements. Hence, in *Hartson*, we found that the “browsewrap” agreement was not binding.

Wessel’s reliance on *Hartson* is misplaced, for a “clickwrap” agreement significantly differs from a “browsewrap” agreement. As the trial court here said, “the clickwrap agreement provided adequate notice to Wessel as a user of the website because it required clicking assent, an affirmative action on his part, and indeed on the part of any user, before access to the website was permitted.” We find that the “clickwrap” agreement at issue is valid and binding. We note that many other courts across the nation have almost uniformly reached a similar conclusion.

Affirmed.

July 2020

MPT-2 Point Sheet

Fun4Kids Terms of Service Agreement

The MPT point sheet addresses the factual and legal points encompassed within this MPT. It presents the expected issues that might be addressed by an examinee in a thorough answer to the problem, but it should not be construed as a model answer.

Fun4Kids Terms of Service Agreement

DRAFTERS' POINT SHEET

In this performance test item, the examinee is an associate in the law firm of Weiss & Briotti, which represents Fun4Kids Inc., a client planning to start a commercial internet service designed to provide educational games for children ages 11 through 14. The client's owner, Jan Morrison, is aware that there are both federal and Franklin state laws and regulations governing websites aimed at children, and she seeks legal help. Specifically, she asks that counsel advise on particular issues relating to the appropriate "terms of service" agreement, which would bind those using the service.

The issues that the examinee is to address are set forth in the transcript of an interview between Tony Briotti, the supervising partner, and Ms. Morrison. The examinee has been asked to (1) identify the issues presented in that interview and (2) make recommendations as to how to address those issues, based on an analysis and explanation of the law and the facts. (The examinee is instructed not to draft the provisions of the terms of service agreement.)

The File contains (1) the instructional memorandum, which includes a template for the examinee to use in completing the task; (2) the transcript of the client interview; and (3) excerpts from a Federal Trade Commission press release concerning a fine levied on Persimmon Inc., an online service for children, to settle a complaint alleging violation of the law. The Library contains (1) excerpted provisions of the Children's Online Privacy Protection Act (COPPA), 15 U.S.C. § 6501 *et seq.*; (2) excerpted provisions of Federal Trade Commission regulations under COPPA, 16 C.F.R. §§ 312.3–312.7; (3) a provision of the Franklin Civil Code dealing with disaffirmance of contracts; (4) excerpted provisions of the Franklin Children's Protection on the Internet Act (CPIA) dealing with prohibited online advertising for children; and (5) *Sampson Scientific Foundation, Inc. v. Wessel*, a Franklin Court of Appeal case addressing the difference between "browsewrap" and "clickwrap" terms of service agreements.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The examinee must, first, master the facts as revealed by the interview transcript and specifically identify the five issues that must be addressed. Second, the examinee must analyze the law, as set forth in the statutes, regulations, case law, and other materials; apply the law to the facts for each issue; and make a recommendation as to how to address each issue. As noted in the instructional memorandum, the examinee need not draft the relevant provisions of the terms of service agreement; rather, the partner will undertake that drafting based on the examinee's analysis and recommendations.

The examinee should address each of these five issues, making a recommendation for each:

(1) Browsewrap or Clickwrap Terms of Service Agreement: The question is whether, given the provisions of COPPA, the regulations under it, and the holdings in *Sampson Scientific Foundation* and *Hartson v. Hobart*, discussed within *Sampson*, a browsewrap terms of service agreement would suffice or a clickwrap terms of service agreement is necessary.

(2) Parental Consent: The question is whether verifiable parental consent to use the website is necessary, given the age of the children it purports to engage and the provisions of COPPA and the regulations under it; and if so, how to obtain such consent. An additional question is whether agreements made by those minors for whom parental consent is not necessary under COPPA may nevertheless be disaffirmed by parents under Franklin law.

(3) Use of Credit Cards: The question is whether, and under what circumstances and limitations, credit cards may be used to pay the fees the website is planning to charge. Here, the FTC press release provides information on what is and what is not allowable.

(4) Gathering Information on Users and Providing It to Advertisers: The question is whether the Fun4Kids website may gather the information it would like from users and provide that information to advertisers, and if so, under what conditions.

(5) Limitations on Advertising: The question is whether the website may allow certain advertising for *all* users, under the Franklin Children's Protection on the Internet Act.

II. DISCUSSION

A. FACTS

The key facts, gleaned from the transcript of the interview with Ms. Morrison, are as follows:

- Fun4Kids will offer educational games for children ages 11 through 14 on its website and related mobile app. These games have been created after considerable research on the approaches that best educate and appeal to children in that age group.
- The client needs to know if there are legal limitations, under statutes or regulations, that affect the intended use of the website.
- The client would like to use a browsewrap terms of service agreement, in which the mere use of the site indicates agreement with the terms of service provisions. If that is not possible, the client would use a clickwrap agreement, in which the user must take action to signify agreement with those terms.
- The client needs to know if verifiable parental consent to use the website is required, and if so, how to secure it. The client also needs to know if the agreement to use the service made by minors who are not covered by COPPA may nevertheless be disaffirmed by parents.
- The client plans to charge a monthly fee to use the service and a fee for each game used. The client needs to allow for payment of those fees by credit card.
- In addition to those fees, the client plans to earn revenue by allowing advertising on the site. As that advertising will be individually targeted at users of the website, the client would like to collect information on the users, including each user's name, home address, gender, age, and email address, and furnish that information to advertisers. All those items of information are necessary for the delivery of the educational content of the games except for home and email addresses.
- The client needs to know if there are any limitations on advertisers on the website.

B. SUMMARY OF APPLICABLE LAW

COPPA and the FTC regulations under it apply only to the collection, use, and disclosure of personal information from users who are under the age of 13. COPPA requires verifiable parental consent in such circumstances for any user who is a “child.” 16 C.F.R. §§ 312.3(b), 312.5(a). COPPA defines a “child” as an individual under the age of 13. COPPA § 6501(1). That means that half the intended users of the website (those children ages 11 and 12, but not those ages 13 and 14) come within the definition, and so COPPA applies to the website for those children. Hence, the answers to all the following issues regarding COPPA and the regulations under it apply only to those users. The Franklin state statutes (Fr. Civ. Code § 200.1 and CPIA) apply to users under the age of 18 and hence apply to *all* users of the website.

C. ANALYSIS

The examinee should follow the template given, identify and analyze each issue, and make a recommendation as to each, as follows:

1. Issue: May the client use a browsewrap agreement, or should a clickwrap agreement be used?

Analysis and Recommendation: The client should use a clickwrap agreement. Given the many requirements in COPPA and the FTC regulations for verifiable informed parental consent and disclosure (e.g., COPPA §§ 6501(4) and 6501(9), 16 C.F.R. §§ 312.3(b), 312.4, and 312.5, and the FTC press release), and the holding in *Sampson Scientific Foundation, Inc. v. Wessel*, a positive action connoting agreement with the terms of service, as would be had in a clickwrap agreement, is a necessity.

In *Sampson*, the court defined a “browsewrap agreement” as one in which “the user’s consent is deemed given by the mere use of the website, without the need to click an ‘Agree’ or ‘Disagree’ button.” By contrast, a “clickwrap agreement” requires a user to click a button to “Agree” or “Disagree” with the terms of service before the user obtains access to the website. The website at issue in *Sampson* had a clickwrap agreement. Citing *Hartson v. Hobart* (Fr. Ct. App. 2011), the defendant in *Sampson* argued that the plaintiff’s terms of service agreement should not be enforced. The court disagreed, noting that the browsewrap agreement in *Hartson* was not binding on the user of a commercial loan website because there was no evidence that the user had actual

knowledge of or assented to the website owner's terms. Determining the validity of a browsewrap agreement required a fact-specific inquiry into whether or not the user had actual or constructive notice of the agreement's terms. By contrast, the defendant in *Sampson* had taken the affirmative action of clicking the "Agree" button. Therefore, the defendant had adequate notice of the website's terms of service, which included a pledge to maintain the confidentiality of information posted on the website. In sum, a clickwrap terms of service agreement makes it more likely that the agreement will be enforceable.

2. Issue: Is verifiable parental consent for all users of the service necessary? If so, how should it be obtained?

Analysis and Recommendation: As noted above, COPPA and the FTC regulations under it require verifiable parental consent before a website user may collect personal information about children under the age of 13 who use the website. As Ms. Morrison noted in the interview, the website intends to gather personal information about its users. As also noted in the interview, the website is aimed at children ages 11 through 14. Because the client aims to collect personal information about the children who use the website and COPPA and the FTC regulations apply to at least half the intended users of the website, verifiable parental consent for those users under the age of 13 is necessary. 16 C.F.R. §§ 312.3(b) and 312.5. COPPA defines obtaining verifiable parental consent as making a "reasonable effort" to obtain it. COPPA § 6501(9). The FTC regulations specify acceptable forms of verifiable parental consent as including returning a consent form; requiring a parent to use a credit card that provides notification of each discrete use; having a parent call a toll-free number staffed by trained personnel; having a parent connect to trained personnel via videoconference; and checking the parent's government-issued identification against an appropriate database. 16 C.F.R. § 312.5(b)(2). The client should use one or more of these forms of obtaining consent. Astute examinees will note that, as credit card use is also to be required by the website, that would be the best (and need be the only) way to obtain verifiable parental consent.

In addition, the client must be informed that the Franklin Civil Code allows disaffirmance of contracts (including the terms of service agreement to use the website) for minors under the age of 18, and hence parental consent for all children using the website would be necessary unless the client is willing to run the risk of disaffirmance.

3. Issue: May the owner of the website require users to employ credit cards to pay fees? If so, should any safeguards be imposed on the use of credit cards by users?

Analysis and Recommendation: The website may have fees paid by credit cards. However, it must take steps to ensure that it obtains informed parental consent for credit card use. Specifically, as revealed by the FTC press release concerning its settlement with Persimmon, the website must obtain express informed consent before credit card charges may be made. That consent must include notice to the parent of what the charges may be and the uses for which they may be incurred, an explanation to the parent that the use of a password will make the charge final, and the option for the parent to withdraw the consent at any time. *See* FTC press release.

4. Issue: May the website obtain the personal information on users it desires to obtain and provide that information to advertisers? If so, under what conditions?

Analysis and Recommendation: The website may obtain all the personal information it would like for those users who are 13 and 14 years old. It may obtain certain, but not all, of the personal information it would like for those users who are 11 and 12 years old. According to the interview with Ms. Morrison, the website would like to obtain the following personal information: the user's name, home address, gender, age, and email address. COPPA lists all those items of information as "personal information" subject to its provisions. COPPA §§ 6501(8)(A), (B), (C), and (G). COPPA further requires that any collection of such information regarding a "child" (i.e., a user under the age of 13) is subject to FTC regulations. *Id.* § 6502(a)(1). The FTC regulations require that a child's parent must be given the opportunity to withhold consent to the collecting of information and also to withhold consent to the disclosure of that information to third parties. 16 C.F.R. §§ 312.5(a)(2).

Further, the FTC regulations allow collection only of personal information that is "reasonably necessary to participate in [the] activity [of the website]." *Id.* § 312.3(d). As Ms. Morrison's interview states, there is no need to gather the users' home and email addresses to allow participation in the website's activities, whereas the other items of personal information are necessary for pedagogical reasons relevant to the website's activities. Hence, for those users under 13 years old, the website may collect information on the user's name, gender, and age, but *not* home and email addresses. And the website must provide notice to the parents that such

information is being gathered and made available to third-party advertisers. Provided the child's parent has not withheld consent to its disclosure to third parties, the client may then share that information with advertisers.

5. Issue: Are there any limitations on advertising on the website? If so, what are those limitations and how should they be addressed?

Analysis and Recommendation: The Franklin Children's Protection on the Internet Act (CPIA) limits the type of advertising that may be used on websites aimed at minors. A "minor" is defined as "an individual under the age of 18 years." CPIA § 18(a). As the website will be aimed at children from 11 to 14 years old, CPIA applies to all users of the website. CPIA lists eight types of products and services that may not be advertised on websites directed to minors. CPIA § 18(h). Advertisers of those products and services may not employ the website.