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December 28, 2009

**Re: Margaret Hunt Hill Bridge –
B-1 Visa Revocations of the Cimolai and COS.ME personnel, and
Urgent Request for Intervention**

Dear Interested Parties:

I received two December 24, 2009 emails sent by Mr. Jeffrey Gorsky of the Visa Office, U.S. Department of State ("State" or "DOS"), confirming that, despite the substantial additional evidence of B-1 visa eligibility we submitted on December 19, State has refused to rescind or withdraw its decision to revoke the visas of the Cimolai and COS.ME personnel. Quoted immediately below is State's decision as communicated by Mr. Gorsky:

The visas for the aliens who had returned to Milan were revoked there. The visas for the aliens still in the US were revoked by the Deputy Secretary of State for Visa Services **effective upon the aliens first leaving the United States**. The decision to revoke the visas was reviewed and approved by the Managing Director of the Visa Office and the Office Director for the Office of Legislation, Regulations and Advisory Assistance. [Bolding added.]

If you wish for this decision to be reviewed, the basis for doing this would be for the aliens to make application for a new visa. At that point they would have an opportunity to attempt to demonstrate why they are eligible to come on B-1 status. . . . Certificates of revocation are protected under [Immigration and Nationality Act § 222(f)] and cannot be released, but in any case these are standard formats without any useful info.

As explained below, I believe that State's actions are not supported by the facts, not responsive to our request, and are arbitrary and contrary to law. It is especially troubling that DOS did not previously inform us that the revocations would only take effect when the B-1 personnel leave the United States. This apparently means that the four individuals who have not departed possess still-valid and unrevoked B-1 visas and may continue to render services on the bridge project. It also means that, had the others been properly informed of State's action, they might well have decided to refrain from traveling outside the U.S., and thus would not have been prevented from engaging in B-1 services on the Margaret Hunt Hill Bridge project.

Here are the reasons that State's actions are legally improper:

- State acted unilaterally and prematurely in revoking the visas and thereby reversing the decision of the U.S. Consular Officer in Milan who correctly determined, based on the evidence

submitted with 16 individual visa applications and applicable law, that each nonimmigrant applicant qualified for the B-1 visa under the subcategory available to commercial or industrial workers engaging in after-sales installation services. See 9 Foreign Affairs Manual ("FAM") 41.31 Note 10.1, 22 CFR § 41.31(b) and 8 CFR § 214.2(b)(5).

- State's acts of visa revocation are directly contrary to the decisions of two immigration agencies within the Department of Homeland Security ("DHS") – U.S. Customs & Border Protection ("CBP") which admitted the 16 nonimmigrants as B-1 entrants, and U.S. Citizenship and Immigration Services ("USCIS") which on at least five separate occasions extended the nonimmigrant status as B-1 commercial or industrial workers engaging in after-sales installation services.
- By overriding the actions of two of DHS's immigration agencies, State acted in violation of § 428 of the Homeland Security Act of 2002, P.L. 107-296, which, with certain exceptions not relevant to the present matter, vests the Secretary of DHS "exclusively with all authorities to . . . administer. . . and enforce the provisions of . . . [the Immigration and Nationality Act ("INA")], and of all other immigration and nationality laws, relating to the functions of consular officers of the United States in connection with the granting or refusal of visas."
- State provided no specific factual justification for its assertion that the B-1 nonimmigrants were engaged in building or construction work, when all of the evidence demonstrated that the installation of pre-assembled specialty steel equipment, made to precise contractual specifications, using expertly trained steel technicians who apply proprietary knowledge of Cimolai, the seller, approved by the State of Texas in Italy at the point of preassembly and disassembly before shipment, falls squarely within the permitted scope of B-1 after sales service activities and is not prohibited construction work.
- State violated procedural due process when it declined to rescind the visa revocations despite the foregoing evidence, declined to inform the B-1 nonimmigrants, Cimolai or Cimolai's legal counsel that the revocations would only take effect upon the individuals' departure from the United States and declined to provide a copy of the visa revocation documents to legal counsel.

Given that DHS holds exclusive authority over the determination of B-1 visa eligibility, I believe efforts should be made by you and other interested parties to reach out to the U.S. Senators and the Members of the House of Representatives from Texas to ask for their immediate intervention in:

- (1) causing DOS to rescind the visa revocations, and/or
- (2) causing DHS to rescind the visa revocations or otherwise allow the affected foreign specialists to enter and work in the United States for purposes of rendering installation services (e.g., by instructing the U.S. Consular Officer in Milan to expeditiously issue new B-1 visas or by exercising DHS's parole authority to allow admission into this country and its authority to grant employment authorization to these individuals).

You should also know that Mr. Gorsky suggested that Cimolai submit new B-1 visa applications to the U.S. Consulate in Milan or that Cimolai pursue H-2B visa applications for its specialist personnel.

Neither of these approaches is likely to be successful within the time constraints of the bridge project and – in my view – neither is an appropriate or practical substitute for the effort suggested above to rescind the B-1 visa applications or obtain DHS cooperation in instructing the U.S. Consular Officer to issue B-1 visas or granting the specialists parole into the U.S. and employment authorization.

The B-1 visa applications are likely to require the U.S. Consular Officer in Milan to seek an Advisory Opinion from the DOS Visa Office, as required in a May 24, 2001 cable issued by State. I quote the relevant section of the cable below:

UNCLASSIFIED TELEGRAM

May 24, 2001

To: ALL DIPLOMATIC AND CONSULAR POSTS - ROUTINE

Origin: VO

From: SECSTATE WASHDC (STATE 92023 - ROUTINE)

TAGS: CVIS, CMGT

Captions: VISAS

Subject: B-1 VISAS AND BUILDING/CONSTRUCTION WORK

Ref: 9 FAM (22 CFR) 41.31(B)

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6. CASES WHICH SHALL BE SUBMITTED FOR ADVISORY OPINIONS SHALL INCLUDE, BUT NOT BE LIMITED TO, ANY CASE WHERE THE STATE DEPARTMENT OFFICIAL BELIEVES THAT THE ALIEN IS APPLYING FOR A B-1 VISA TO ENGAGE IN:

A. THE INSTALLATION, MAINTENANCE, AND REPAIR OF: UTILITY SERVICES, ANY PART OF THE FABRIC OF ANY BUILDING OR STRUCTURE, AND INSTALLATION OF MACHINERY OR EQUIPMENT TO BE AN INTEGRAL PART OF A BUILDING OR STRUCTURE [Bolding Added.]

Given this cable, it is likely that the issue of whether or not to grant new B-1 visas will rest once again with the DOS Visa Office. Thus, I believe it is unlikely in light of the Visa Office's recent actions that the visa applicants would get a fair hearing and that the visas would be promptly issued. In addition, a principle known as "consular nonreviewability" – which has caused the federal courts to refrain from overturning visa refusals of consular officials – would deprive Cimolai and the foreign specialists from their day in court should that prove necessary to secure their legal rights.

For different reasons, the H-2B visa category is not a viable alternative strategy. The H-2B visa requires action by three federal agencies: the U.S. Department of Labor (DOL), USCIS and the U.S. Consular Officer in Milan. The H-2B visa procedure also requires a mandatory waiting period to recruit for any qualified U.S. workers, even though, as we know, the skills necessary are proprietary to Cimolai and can only be gained in Italy. The waiting period would delay the project by several weeks and possibly lead to expensive cost overruns. Moreover, if DOI were to challenge the job



requirements, as is likely, an audit would follow and thereby delay the project still further for a prolonged period.

If this were not sufficient cause for concern, another provision of law allows only citizens of certain designated countries (not including Italy or Slovakia) to enter the U.S. as H-2B nonimmigrants. According to the USCIS's H-2B page on its www.uscis.gov website (more conveniently accessible at <http://tinyurl.com/y8gob77>), the designated countries are Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Japan, Mexico, Moldova, New Zealand, Peru, Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine and the United Kingdom. See also, 8 CFR §. 214.2(h)(5)(i)(F)(1)(i).

Since Cimolai's foreign specialists are citizens of Italy or Slovakia, they are barred from receiving H-2B visas unless a special determination is made by the Secretary of DHS "in his sole and unreviewable discretion" that it is "in the U.S. interest" for an H 2B visa to be issued to foreign citizens not on the approved list based on the following factors provided in 8 CFR §. 214.2(h)(5)(i)(F)(1)(ii):

Determination of such a U.S. interest will take into account factors, including but not limited to:

- (A) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list described in paragraph (h)(5)(i)(F)(1)(i) of this section;
- (B) Evidence that the beneficiary has been admitted to the United States previously in H-2A status;
- (C) The potential for abuse, fraud, or other harm to the integrity of the H-2A visa program through the potential admission of a beneficiary from a country not currently on the list; and
- (D) Such other factors as may serve the U.S. interest.

As you can see, under Item (A), Cimolai would be required to prove not only that no U.S. workers are available but also to satisfy the more difficult burden of proof that no workers with the required skills can be found in Argentina, Australia, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Indonesia, Israel, Jamaica, Japan, Mexico, Moldova, New Zealand, Peru, Philippines, Poland, Romania, South Africa, South Korea, Turkey, Ukraine and the United Kingdom. The other required factors – Items (B) through (d) – are also quite difficult and time consuming.

Given these requirements, while Cimolai could attempt to obtain H-2B visa petition approval and issuance of H-2B visas if it had the luxury of time, it is likely that this effort would take at least two to three months to accomplish. My understanding is that the project cannot tolerate such a delay. Therefore, I ask, as noted above, that efforts be made by you and other interested parties to reach out

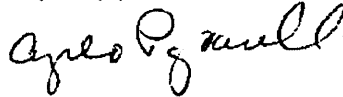
to the U.S. Senators and the Members of the House of Representatives from Texas to ask for their immediate intervention in:

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Please recognize that time is of the essence because the visa revocations have interrupted the rendition of installation services, thereby causing substantial disruption to the project. Thank you for your help in this matter.

Very truly yours,



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AAP/hl

