Exhibit 24
Written Interrogatories to State Department in Matter of Walsh and Pollard

UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW BEFORE THE IMMIGRATION JUDGE

IN THE MATTERS OF:	)	A26 491 503
Anthony Walsh	)	A26 491 504
Edwin Pollard	)	IN EXCLUSION PROCEEDINGS

APPLICANTS' WRITTEN INTERROGATORIES TO VISA OFFICE

Pursuant to the Order of the Court authorizing the testimony of the Visa Office to be presented in the form of answers to written interrogatories, applicants hereby propound the following interrogatories to the Visa Office:

1. Identify the person(s) answering these Interrogatories, including for each such person the name, title or position, description of job duties and authority and experience with the Visa Office.

2. For each person listed in number 1 above, identify what, if any, experience such person has had in the area of treaty visas.

3. Identify the person(s) in the Visa Office who has responsibility for the promulgation of policies relating to treaty visa issuance.

4. Who drafted the Foreign Affairs Manual Notes relating to treaty traders and treaty investors?

5. What is the role of the Visa Office? What is the relationship of the Visa Office to U.S. Consuls?

6. Please refer to Exhibit 1 attached. Was the Visa Office apprised of the concept of the investment described in Exhibit 1 prior to visa issuance? If so, please describe the circumstances and the Visa Office response. Discuss specifically what, if any, guidance the Visa Office provided with respect to the parameters of the business arrangement that would be appropriate to fit within the treaty investor classification and whether the investment set forth in Exhibit 1 is consistent with the guidance so given.

7. Was the Visa Office apprised of the fact that the treaty investor company described in Exhibit 1 intended to bring large numbers of automotive designers to work in the United States for the treaty investor company at locations within the automotive industry in Detroit as ``essential skill employees'' of a treaty investor? If so, please describe the

guidance provided as to the appropriateness of the E-2 classification for such individuals.
8. Did the Consul General at the U.S. Consul in London, England consult with the Visa Office prior to making a decision to issue E-2 visas for the company described in Exhibit 1? If so, describe the nature of the advice given to the Consul.

9. Is Exhibit 1 consistent with the understanding of the Visa Office at the time it provided guidance as set forth in the above Interrogatories and at the time it provided advice to the U.S. Consul in London, England?

10. Assuming that all of the facts in Exhibit 1 are true, in the opinion of the Visa Office, has a ``substantial investment'' been made sufficient to classify the investing company as a ``treaty investor''?

11. Is it necessary that the entire amount of a ``substantial'' investment have been made at the time of E-2 visa issuance, or is it sufficient if the initial stages of the investment have been made at the time of visa issuance with the investor company intending to, and actively in the process of, continuing and expanding its investment?

12. Is there any minimum amount of investment that is necessary to qualify as a ``substantial investment'' sufficient to have a company categorized as a treaty investor company for purposes of E-2 visa issuance? If not, please discuss the criteria for determining whether a substantial investment has been made by a company that wishes to start a new business in the United States.

13. Please describe the relationship between the Immigration and Naturalization Service and the Visa Office on issues relating to treaty visa policies, regulations and/or interpretations. Please specifically address the issue of whether and why the Immigration and Naturalization Service customarily defers to the Visa Office on such matters.

14. How many E-2 visas have been issued by U.S. Consuls in the last two completed fiscal years?

15. Which agency of the United States Government is charged with negotiating and interpreting treaties of commerce and navigation that are the basis for the issuance of treaty visas?

16. If an alien is entitled to issuance of two different categories of visa, does such alien have the right to choose the visa category under which he wishes to enter the United States?

17. Please describe the requirement of ``develop and direct'' as it relates to treaty investors. Please discuss specifically whether there is any requirement that a non-managerial, non-supervisory, non-start-up employee of a treaty investor company must develop and/or direct the enterprise in order to be issued an E-2 visa as an essential

skill employee of a treaty investor company. Include in your answer whether, to your knowledge, the Immigration and Naturalization Service has agreed or disagreed with this interpretation.

18. Are the requirements in the Foreign Affairs Manual relating to ``technicians'' and ``start-up employees'' required for ``essential skill employees'' of a treaty investor company who are not technicians or start-up employees?

19. Is there any requirement that an employee of a treaty investor company must be engaged in training of United States workers in order to be properly classified as an ``essential skill employee'' of a treaty investor company entitled to E-2 status?

20. Is there any requirement that a non-start-up ``essential skill'' employee of a treaty investor company must be replaced by a United States worker in order for the employee to receive E-2 classification?

21. If an individual otherwise qualifies as an ``essential skill employee'' of a treaty investor company, it is necessary that such individual have worked with the treaty investor company overseas or have familiarity with the overseas operation in order for such individual to be classified in E-2 status in order to work for the treaty investor company in the United States?

22. Assuming that the facts set forth in Exhibit 1 are true, and assuming that the treaty investor company set forth therein wishes to bring automotive designers to the United States to work as employees of the treaty investor company at locations in the U.S. automotive industry pursuant to contracts between the treaty investor company and companies within the U.S. automotive industry and assuming that there is a total unavailability of automotive designers in the United States available to perform the services for which the automotive designers are coming to the United States and assuming that the U.S. companies are paying the treaty investor company more for the services of these automotive designers than they are paying for United States automotive designers and assuming that the automotive designers are performing services essential to the treaty investor's business in the United States and assuming that the automotive designers are the product of an educational system in the United Kingdom that has no equivalent in the United States for training of automotive designers and assuming that the automotive designers are performing functions in the United States requiring the education, training and experience as automotive designers that they obtained prior to coming to the United States and assuming that the United States automotive industry has commenced programs to expedite the training of qualified United States automotive designers and assuming that the automotive designers will be performing jobs in the United States that require high degrees of skill, creativity and imagination and assuming that the presence of the automotive designers constitutes a critical element in the decision of the U.S. automotive industry to engage in a major automotive redesign program in the United States as opposed to doing so overseas and assuming that the performance of this design work in the United States is of great significance to the U.S. automotive industry and to the economy of the state of Michigan,

are the automotive designers in question qualified for E-2 visa issuance as ``essentially skilled employees'' of a treaty investor? Please explain why or why not and include in your answer whether any single one of the assumptions is critical to such a determination.

23. Assuming the truth of the facts in the immediately preceding Interrogatory and assuming that a Consul were presented with Exhibit 1, would the Visa Office consider the issuance of E-2 visas to the employees in question and the classification of the company as a treaty investor company to be consistent with previous interpretations and applications of the treaty investor laws; or would such visa issuance be considered to be unprecedented?

24. Has the Visa Office been advised by the Immigration and Naturalization Service Central Office of its reasons for supporting the Detroit District of INS in failing to admit applicants Walsh and Pollard? If so, please describe the reason or reasons given and whether the Visa Office has agreed with those reasons or with the conclusions reached by the Immigration and Naturalization Service.

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VISA OFFICE RESPONSE TO APPLICANT'S WRITTEN INTERROGATORIES

1. The persons answering these Interrogatories are Mr. Cornelius D. Scully, III. and Mr. Stephen K. Fischel. Mr. Scully is the Director of the Office of Legislation, Regulations and Advisory Assistance for the Visa Services within the Bureau of Consular Affairs of the Department of State. He has been employed by the Department of State since January 1962. From that time until 1970 he was a Foreign Service Officer and since 1970 he has been a Civil Servant, and is currently a GM-15. During his service as a Foreign Service Officer he had various assignments, both in Washington and abroad, in positions in which his responsibilities related partially or entirely to the issuance or refusal of visas. Since 1970 he has occupied various positions of increasing responsibility. From 1973 to 1979 he was Chief of the Regulations and Legislation Division of the Visa Office and has occupied his present position since January 1979. He supervises the operations of the Regulations and Legislation Division, the Advisory Opinions Division and the Coordination Division. Collectively, these three Divisions are responsible for rendering advisory opinions in individual visa cases on matters such as ineligibility under section 212(a) of the Immigration and Nationality Act, proper nonimmigrant classification under section 101(a)(15) of the Act, proper immigrant classification and foreign state chargeability under sections 201, 202, and 203 of the Act; for formulating and interpreting the regulations in 22 C.F.R. Parts 41 and 42 governing the issuance and refusal of nonimmigrant and immigrant visas; and for preparing analyses and commentary on proposed immigration legislation, as called upon. In addition, his office--and, frequently, he personally--participates in the handling of litigation relating to visa operations, furnishing technical information and other assistance as requested to the Department of Justice and United States Attorneys.

Mr. Fischel joined the Advisory Opinions Division of the Visa Office in 1975. Four years later he became Deputy Chief of that division which renders opinions on legal issues arising in all aspects of the visa process, including those involving nonimmigrant visa classification. In October 1984 he assumed his current position as Chief of the Legislation and Regulations Division, which has responsibility for preparing analyses and commentary on proposed immigration legislation, for promulgating regulations, and for maintaining the 9 FAM (the four volume visa portion of the Foreign Affairs Manual).

2. Throughout his entire career with the Department of State, Mr. Scully has had a continuing experience with treaty trader/investor visas. His responsibilities varied from adjudicating visa applications as a foreign service officer, publishing of the note material

in the FAM as Division Chief of the Legislation and Regulations Division, to overseeing the advisory opinion process and the publication of the more recent guidelines on treaty trader/investor visas as Office Director, his current position.

Mr. Fischel rendered many opinions on the treaty trader/treaty investor cases while in the Advisory Opinions Division. As deputy chief he not only reviewed all opinions drafted on the topic in that division, but also directly oversaw the preparation of the instructional guidelines published in the form of bulletins in 1981 and 1982 (incorporated into the FAM in 1983).

3. Although the Deputy Assistant Secretary for Visa Services, Mr. Vernon D. Penner, Jr. sets policy for the Visa Office and the Assistant Secretary for Consular Affairs, Ms. Joan Clark, possesses the ultimate authority for establishing policy, most questions involving treaty trader/investor visas are resolved in the Advisory Opinions Division which falls under the directorship of Mr. Scully. That division is specifically tasked with the responsiblity of rendering opinions on issues relating to treaty trader/investor visa classification. The Division Chief, Mr. Cecil H. Brathwaite, routinely reviews all opinions rendered by that division. Opinions of significance or precedent are reviewed and resolved by the Office Director, Mr. Scully.

4. The Visa Office published a 1981 telegram or bulletin concerning treaty traders and a 1982 telegram or bulletin dealing with treaty investors. These bulletins were a compilation of advisory opinions rendered by the Advisory Opinion Division and constituted instructional guidance to consular officials to assist them in adjudicating treaty trader/investor visa applications. Mr. H. Richard Sindelar III, then a staff member of the Advisory Opinion Division, compiled and drafted the two treatises. Mr. Fischel, as deputy chief of the division, oversaw the entire project and worked very closely with Mr. Sindelar. These cables were later incorporated into the FAM. by Ms. Lorraine Lewis of the Division of Legislation and Regulations on June 29, 1983.

5. The provisions of Section 104 of the INA charge the Secretary of State with the responsibilities of administering and enforcing all provisions of the Immigration and Nationality Act and immigration laws relating to the issuance and refusal of visas with one exception. These duties are delegated to the Assistant Secretary of State for Consular Affairs to whom the director of the Visa Office, the Deputy Assistant Secretary for Visa Services, reports. Thus, the Visa Office bears the responsibility of performing the duties charged to the Secretary of State relating to visas. Yet, the statute by specific language confers exclusive authority upon consular offices to grant or refuse visas. The consuls' decisions to issue or refuse visas in individual cases are not subject to judicial review, although pursuant to 22 C.F.R. § 41(42).130, the Department of State's interpretation of law is binding on the consul. Pursuant to the delegation of authority by the Secretary of State, it is the Visa Office which in practice sets policy and interprets the INA as it relates to visas. Such policy and interpretations of law are binding on the consular officers.

6. The Visa Office was apprised of the concept rather than the particulars set forth in Exhibit I at the time of visa issuance. Prior to visa application and issuance, Mr. Klasko met with Mr. Scully and Mr. Fischel to discuss the possible visa classification for such workers. Each business visa classification was discussed, resulting in a finding that the treaty investor visa classification was the only viable possibility. This classification was found to be logical, as it is particularly appropriate for businesses engaged in providing services in the U.S.

The issues of substantial investment and essential employees were discussed in specific to this general proposition. Mr. Scully and Mr. Fischel reviewed the guidelines of these issues (as set forth on the Foreign Affairs Manual) with Mr. Klasko, thereby indicating the parameters of the classification. As the nature of the business controls the amount of money needed to establish the business, it was agreed that service oriented businesses generally require lesser amounts of money to commence business. Often to establish a business, the enterprise need only to acquire office space, office furniture, telephones, and any other amenities needed to provide the services in question. It was further agreed that by the nature of the proposed business, the enterprise appeared to need only the office facilities as listed above to commence business. Once the amount of money needed to establish the business is determined and the investor invests 100% of that amount, then the proportionality test is clearly met. The investment would then be substantial.

Although Exhibit I was not available at the time of the meeting, it is clear that the business structure described therein falls within the parameters discussed at that meeting.

7. Yes, The Visa Office was made aware of the fact that the number of employees contemplated might be in the hundreds although no specific number was given. It was understood that the employees were to perform the designated services at the site of the automobile manufactures rather than at the investor's office in the U.S. It was agreed that this fact was consistent with E-2 visa classification. The question of the number of employees was not considered to be significant, as all visa applicants as employees of a treaty investor enterprise would have to satisfy the requirement of being either an executive/manager or being an essential employee to the efficient operation of the enterprise. The proper and normal operation of these tests would control the number of persons contemplated by the treaty and statutory provisions.

8. At the meeting with Mr. Klasko the Visa Office assured him that he could tell Mr. Kreuser, Secretary for Consular Services at the U.S. Embassy in London of the particulars of the conversation at the Visa Office. The Visa Office suggested that Mr. Klasko have Mr. Kreuser call Mr. Scully, if he had any questions regarding the matter. Mr. Kreuser did indeed call Mr. Scully after meeting with Mr. Klasko in London. The discussion focused on the general parameters of the E-2 classification as was discussed in the meeting at the Visa Office with Mr. Klasko. The cases of individual visa applicants were not discussed. All parties were satisfied with appropriateness of the E-2 classification.

9. The particulars described in the Exhibit are consistent with and fall within the parameter of the discussion.

10. Yes.

11. The regulations at 22 C.F.R. § 41.41 require that an alien make or be in the process of making a ``substantial'' investment in an enterprise. When an alien is in the process of investing, very specific committed steps must have been taken. The funds must be irrevocably committed to the business. Often the funds are held in escrow or similar irrevocable circumstances pending the actual investment transaction. Such arrangements qualify whereas the lack of irrevocability would not constitute sufficient evidence of compliance with the requirement of ``being in the process of investing.'' When an alien seeks classification under Section 101 (a)(15)(E)(ii), the amount of the investment at the time of application, not the amount projected for future investment, is considered in order to meet the substantiality requirement. Although the declaration of intent to invest more funds in the future is not a relevant consideration to meet the substantial investment requirement, it may demonstrate that the business is a viable commercial enterprise. One of the requirements for E-2 visa classification is that the business be a real, operating commercial enterprise (9 FAM 22 C.F.R. 41.41 Note 1). A plan for future investment, expansion, and/or development is significant in meeting this requirement. (Note 8.)

12. There is no minimum dollar figure established for meeting the requirement of ``substantial'' investment. The substantiality of an investment is determined by the application of the proportionality test. In brief, the investment must be significantly proportional to the total investment. The total investment is the cost of an established business or the amount needed to establish a new business. In businesses requiring smaller amounts of total investment, the treaty investor must contribute a very high percentage of the total investment, whereas in businesses of larger total investment, the percentage of the treaty investor may be much less. In applying the test, one must first focus on the nature of the business to reasonably determine the total amount of investment needed to establish such business. Clearly, the total amount of money needed to start a consulting service will be much less than to open an automobile manufacturing plant or even a restaurant. In the case of a consulting firm, it might be found that a total of $50,000 investment is necessary to become fully operational. In order to qualify under Section 101(a)(15)(E)(ii), a treaty investor would have to invest a high percentage of that total $50,000. For a total investment of $1 million in a restaurant, the treaty investor might reasonably have to invest at least $5-600,000. Whereas for a $10 million manufacturing plant, $2-3 million might suffice based on the sheer magnitude of the dollar amount invested. (These examples are not intended to establish any set dollar figures, but seek only to demonstrate by example the application of the proportionality test.)

13. The responsibilities of the two agencies are set forth in sections 103 and 104 of the Immigration and Nationality Act. In regards to the formulation of policy, promulgation of

regulations, and the development of interpretation of Section 101(a)(15)(E) of the Act the Visa Office has traditionally taken the lead. As this section of the INA is based upon the existence of treaties and the negotiation of treaties is a responsibility of the Secretary of State, INS has generally deferred to the Visa Office in treaty trader/investor matters. The Operating Instructions of INS at 8 C.F.R. § 214.2(e) refer to the FAM materials to ascertain particulars or peculiarities of the various treaties. The courts are under the impression that INS defers to State Department rulings on ``E'' matters as well. (See Tokyo Sansei v. Esperdy, 208 F. Supp. 945 (1969) at 946. That case, also, cites Nippon Express v. Esperdy, 261 F. Supp. 561.) Deference might, also, have resulted from the fact that U.S. Consular Officials have gained extensive experience in this area as they have been adjudicating ``E'' visa applications for many, many years and have issued a great volume of them.

14. Visa Office statistics reveal that in fiscal year 1984 7,625 E-2 visas were issued, whereas in 1985 8,149 E-2 visas were issued. These figures do not include the total number of applications some of which resulted in denials.

15. The Department of State is charged with negotiating and interpreting treaties of friendship commerce and navigation.

16. The Visa Office has held and continues to hold that an alien can choose to apply for the visa classification of his preference when he can establish entitlement to more than one nonimmigrant visa classification. This principle is implied in 22 C.F.R. § 41.40 note 44 and more clearly stated in 22 C.F.R. § 41.10 note 4 of Volume 9 of the FAM.

17. The requirement to ``develop and direct'' the operation of the enterprise is a requirement for the actual investor as stated specifically in the statute. The regulations (22 C.F.R. § 41.41) and the FAM notes make a clear distinction between the requirements for the actual investor and the requirements which must be met by the employee of a treaty investor. For example, the requirement to ``develop and direct'' does not apply to employees.

The actual investor must be in a position to take affirmative action to develop and direct. Such position is usually held by an individual who possesses control of the operation. Although control can take any form, the most common method is ownership. In Matter of Lee, 15 I. & N. Dec. 187 the Board decreed that the investor must have a ``controlling interest''. In that case, the Board focused on ownership as meeting that test under the facts in that case.

Note 11 in 9 FAM at 22 C.F.R. § 41.41 also cites ownership of at least fifty percent of an enterprise as a means of meeting this requirement. Yet, in view of the various modern creative business structures, the Department's view does not limit the satisfaction of this requirement solely to ownership. The particulars of each enterprise should be reviewed to determine whether by organizational or structural device the investor is in a position to ``develop and direct.'' Among factors considered to assess ``controlling interest'' are ownership, control of stock by proxy, management position and authority, etc.

As the requirement to ``develop and direct'' relates exclusively to the actual investor, the employee of an investor is only required to be employed in a responsible capacity. (22 C.F.R. § 41.41(a)(3).) Employment in a responsible capacity has been interpreted by regulation to constitute employees who are executives or managers or employees who are ``essential'' to the efficient operation of the enterprise. 22 C.F.R. § 41.40(a)(2). It is the employer/treaty investor which must meet the requirements listed in 9 FAM 22 C.F.R. § 41.41 note 1.a-f.

After several meetings, neither Mr. Scully nor Mr. Fischel are familiar with any official view of INS on the issue. In informal discussions with INS officials, the impression was received that INS' prevailing view was consistent with that expressed above and in the FAM.

18. The note material in the FAM provides excellent guidance to consular officials in determining whether an employee of a treaty investor possesses essential skills for the efficient operation of the enterprise. The determination of whether an employee is an ``essential'' employee in this context requires the exercise of judgment. It can not be decided by the mechanical application of a bright line test. The regulations limit the number of nonsupervisory employees of treaty traders to those skilled employees who are trully essential to the business. By its very nature, it is clear that essentiality must be assessed on the particular facts in each case. Not only must the business establish the need for the specialized skills, but the experience and training necessary to achieve such skill must be analyzed to recognize the specialized qualities of the skills in question. Furthermore, the visa applicant must prove that he possesses these skills, demonstrating that he possesses the requisite training and/or experience. The consul will then make a judgment as to whether the employee is essential for the efficient operation of enterprise for an indefinite period or for a shorter period, such as for start-up purposes. It might be determined that some skills are essential for as long as the business is operating. Thus, an essential employee need not be either a technician or a start-up employee.

19. No. There is no absolute requirement that in order to be classified as an essential employee that this employee train others to perform the duties required in that position or that the employer train others to perform those duties. There is an implicit requirement to train only if the skills are of the nature conducive to transfer to the local labor market. Under those circumstances, the onus is on the employer not the employee to provide proper training for local labor. Some skills are not readily transferred, and therefore, remain essential to the efficient operation of the business for an indefinite period of time.

20. No. No regulatory requirement exists for replacement of ``essential'' employees with local workers. This, too, is a judgment made upon analysis of the particular circumstances of a case. If the enterprise and the employee can establish that the need for specialized skills are essential to the firm for an indefinite period and that the applicant possesses such skills, then no need arises to replace him. However, as stated

above, if the skills are transferable, then over a reasonable time the local worker should be trained.

21. There is no requirement that an ``essential'' employee have any previous employment with the enterprise in question. The only time when such previous employment is a factor is when the needed skills can only be obtained by that employment. The focus of essentiality is on the business needs for the essential skills and of the alien's possession of such. Firms may need skills to operate their business, even though they don't have employees with such skills currently on their employment rolls.

22. Yes. The requirements for E-2 visa classification have been met (9 FAM 22 C.F.R. § 41.41 Note 1), as the British investor has made substantial investment in a viable nonmarginal enterprise by establishing a wholly owned subsidiary in the United States. Furthermore, the employees are essential to the efficient operation of the business, as they possess highly specialized skills in design engineering for which experience and training is unavailable in the U.S., and the employer has specific needs for such skills which are, likewise, unattainable locally. The significant factors in reaching that decision concern: (1) the specialized skill, (2) the necessity for that skill for the efficient operation of the enterprise (absent these workers the enterprise could not perform its contractual obligations) and (3) the unavailability of any comparably skilled workers.

23. Issuance of visas under the given facts and assumptions or analogous factors in a service oriented business would be proper. Issuance of visas with these circumstance does not in any fashion alter or extend current principles or interpretations. This fact pattern falls squarely within the current guidelines and creates no new precedent.

24. No. Although the Visa Office and the Central Office of INS have held several meetings on this case, the Visa Office has never received a clear expression of INS' opinion of the technical basis for supporting INS' Detroit exclusion of these individuals.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on March 28, 1986.

Cornelius D. Scully, III Director,
Office of Legislation Regulations and Advisory Assistance
Bureau of Consular Affairs
Department of State

Stephen K. Fischel Chief,
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