



Regional Economics and Job Creation in EB-5 Immigrant Investor Practice

by Paul Sommers, Ph.D., and Lincoln Stone

With the enactment of the Immigrant Investor Pilot Program, the discipline of regional economics became relevant to the practice of U.S. immigration law on behalf of EB-5 category immigrant investors. A successful petition in the EB-5 immigrant investor category requires the petitioner to invest in a new commercial enterprise and to create 10 full-time positions for qualified U.S. workers.¹ The pilot program, enacted in 1992,² provides that an investor seeking EB-5 classification based on investment with a regional center-affiliated entity may rely on “reasonable methodologies” for estimating indirect job creation to satisfy the EB-5 category requirement of creating 10 full-time positions.³ Thus, the EB-5 category immigrant investor who is investing in a regional center-affiliated commercial enterprise need not rely solely on job creation in the immediate commercial enterprise, but also may use estimates of indirect job creation throughout the economy. Typically, indirect job creation is estimated by an expert economist or by an analyst with the appropriate training.

A regional center is an entity that obtains approval from U.S. Citizenship and Immigration Services (USCIS) to promote investment in a specific geographic area of the United States, and is organized “for the promotion of economic growth, including increased export sales, improved regional productivity, job creation, or increased domestic capital investment.”⁴ As EB-5 petition filings have steadily increased in recent years, USCIS reports that more than 90 percent of all EB-5 petitions are regional center-affiliated.⁵

This article does not address general EB-5 compliance issues concerning standard EB-5 category petitions (*i.e.*, petitions that are not regional center-affiliated). Instead, this article focuses on the economic analysis supporting individual EB-5 category immigrant investor petitions that



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1 Immigration and Nationality Act (INA) §203(b)(5); 8 Code of Federal Regulations (CFR) §204.6. The investor should use U.S. Citizenship and Immigration Services (USCIS) Form I-526, Immigrant Petition by Alien Entrepreneur.

2 Pub. L. No. 102-395, Title VI, §610, Oct. 6, 1992, 106 Stat. 1874, as amended.

3 *Id.*, §610(c).

4 *Id.*, §610(a), as amended by Pub. L. No. 107-273, Div. C, Title I, §11037(a), Nov. 2, 2002; *see also* 8 CFR §204.6(e), “regional center” defined.

5 USCIS EB-5 Immigrant Investor Program Stakeholder Meeting, Sept. 15, 2011, *published on* AILA InfoNet at Doc. No. 11072539 (*posted* Sept. 22, 2011). Approximately 200 regional centers have been designated by legacy INS or USCIS. *See* the USCIS website for a complete listing of authorized regional centers.



are regional center–affiliated and on the job creation–related documentation that supports such petitions. USCIS has employed its own economists, who apparently are presently entrenched in the petition adjudication process, assisting USCIS examiners to dissect and contest the economic reports submitted on behalf of regional centers and their investors. Because of the multiple layers of concern the authors have about the designation of regional centers by USCIS, and the fact that the economics-related inquiry at the level of regional center designation poses rather distinct and difficult issues of law and policy, the subject of regional center designation is not covered here.

Overview of Input-Output Models

Regulations provide that reasonable methodologies to estimate indirect jobs may include “multiplier tables, feasibility studies, analyses of foreign and domestic markets for goods or services to be exported, and other economically or statistically valid forecasting devices which indicate the likelihood that the business will result in increased employment.”⁶ Multiplier tables, which are derived from input-output (I-O) analysis, are just one of the means for economics and planning professionals to estimate overall economic and employment impacts that flow from a particular stimulus to the economy.⁷ The I-O method was developed initially during World War II by both American and Russian economists to support wartime planning efforts. A Russian-American economist named Wassily Leontief was awarded the Nobel Prize in economics in 1973 for his work on this topic.⁸ Leontief trained many American economists in the use of the I-O technique, and it is now the standard approach to estimating “multiplier impacts” of investment proposals. As regional center–affiliated investments have fueled the growth in EB-5 practice, the regional economist and the use of I-O models have both become commonplace as support for regional center–affiliated EB-5 category petitions.

At its core, input-output analysis is a means of examining business and consumer relationships within an economy and of measuring the effects on the economy of a change in one or several economic activities. An I-O model is a static model: At any given time—based on production data gathered by the U.S. Department of Commerce—it is ascertained that given quantities of inputs from various industries are used to produce a unit of output in a particular industry. Data are collected to develop a national I-O model that describes the use of inputs from every other industry in producing the output of a particular industry. I-O models also show the sales of each industry to every other industry. Imports of supplies and export sales are represented, including both foreign imports and exports; for state or county models, domestic imports (purchases from other parts of the United States) and domestic exports (sales to other parts of the United States) are included. Through a mathematical manipulation of the data in the I-O model, economists estimate indirect and induced impacts on a study region consisting of a nation or a region within a nation.

I-O models, thus, are statistical representations of inter-industry purchases and sales based on data collection and surveys, and they produce multiplier estimates for a given change in economic activity in one or more industries. In order to make use of the industry analysis, users of the I-O model must provide detailed information on the initial changes in output, earnings, or employment associated with the economic activity under study.

As best understood, an I-O model is not an economic forecast that takes into account varying economic conditions. Nor is a basic I-O model necessarily an econometric model, as it has been inaccurately referred to in USCIS literature on EB-5 matters. By contrast, econometric models use data on variables, either cross sectional or time series data, and regression equations to model a causal relationship that is suggested by a structural model or theory. Real-world EB-5 regional center–affiliated investments do not afford many opportunities for this sort of analysis, because of lack of available data points and the high costs of developing econometric models.

⁶ 8 CFR §204.6(m)(7)(ii).

⁷ See, e.g., R. Miller and P. Blair, *Input-Output Analysis: Foundations and Extensions* (Cambridge University Press 2d Ed. 2009); W. Miller, “Economic Multipliers: How Communities Can Use Them for Planning,” http://www.uaex.edu/Other_Areas/publications/PDF/FSCED6.pdf.

⁸ W. Leontief, *Input-Output Economics* (Oxford University Press 2d Ed. 1986).



FOR MORE INFORMATION ON EB-5 VISAS, be sure to also download Peter S. Ery's and Lincoln Stone's monograph, [The Intersection of Securities Law and EB-5 Investor Practice](#), and Lincoln Stone's [Financial Statements and Accounting Concepts for EB-5 Visa Purposes](#), both available for download through the AILA bookstore!

Two commonly used I-O models are the Regional Input-Output Modeling System (RIMS II),⁹ which was created by the Bureau of Economic Analysis (BEA) in the Department of Commerce, and IMPLAN (Impact analysis for PLANning), which is a privatized version of RIMS II with a few significant enhancements.¹⁰ Both models find routine acceptance with USCIS.¹¹ RIMS II is a service of the BEA; one can purchase tables of multipliers for any single or multi-county adjacent region in the United States from the BEA, which publishes a handbook instructing on appropriate uses of RIMS II.¹² The tables of multipliers are derived by RIMS II staff from the I-O model they maintain at the Department of Commerce. IMPLAN, on the other hand, provides software that directly manipulates IMPLAN's I-O model, which is derived from the same national survey data as RIMS II. Like RIMS II, the IMPLAN software can be configured for any single or adjacent multi-county region in the United States. Users specify the region, and IMPLAN sends data files describing the region that are then installed within the user's I-O software. The installed data and software then are used to conduct economic impact or multiplier studies, with direct control over several variables, such as local purchase percentages, and simultaneous input of both revenues and employment for a sector. This level of detail is not available to RIMS II users.

There are several other I-O models in use in EB-5 practice. Two of these, REDYN¹³ and REMI,¹⁴ stress the dynamic aspects of their models, claiming to capture the changing impacts of a development in the economy more accurately as producers in various sectors respond to initial changes in a particular sector. For example, if a large development puts pressure on prices in supply sectors, other users of those products can respond to those price changes. New local supply businesses might start up in the region in response, but this effect might take several years to occur. A dynamic model can explicitly track the changes in local production capacity that an initial change might cause, whereas a pure I-O model implicitly assumes an instantaneous response. These dynamic features, brought into the REMI and REDYN models through econometric modeling techniques and the use of computable general equilibrium theory, may deal more accurately with the impacts of large projects that can perturb market relationships among sectors.

When a more localized model is available, as in the case of the state of Washington's I-O model,¹⁵ the benefits are more accurate representations of production relationships and exports from the local area. The state of Washington's model is based on surveys of producers located in the state, rather than the national

9 A brief description can be found at <http://bea.gov/regional/rims/brfdesc.cfm>.

10 IMPLAN is provided by MIG, Inc., which was started by researchers at the University of Minnesota. See further information at <http://implan.com/V4/Index.php>.

11 See USCIS *Adjudicator's Field Manual* (AFM) §22.4(a)(2)(A): "Regional centers typically use the RIMS II or IMPLAN economic models to determine the number of indirect jobs that will be created through investments in the regional center's investment projects."

12 *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)*. The third edition of the handbook, published in 1997, can be found at the BEA website, <http://bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf>.

13 REDYN is a product of Regional Dynamics, Inc. of Storrs, CT. See <http://www.redyn.com>.

14 REMI is by Regional Economic Models Inc. of Amherst, MA. See <http://www.remi.com>.

15 The Washington Input-Output Model is managed by the state of Washington's Office of Financial Management in coordination with researchers at the University of Washington. See <http://www.ofm.wa.gov/economy/io/2002/default.asp>.

surveys that RIMS II and IMPLAN utilize. In Washington state, for example, Boeing's airplane products are well known. Boeing is producing large commercial jet transports, whereas other U.S. airplane manufacturers are concentrated either in smaller general aviation aircraft or military airplanes, both of which vary significantly from commercial jet airplanes in their components. These differences suggest that the aircraft sector in a Washington state model should have different input requirements from those of a national model's aircraft sector.

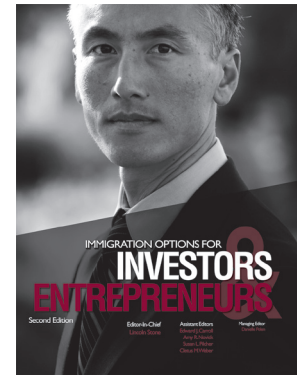
Characteristics of Input-Output Models

USCIS requests that economists include multipliers in job creation studies supplied to the EB-5 program. Analysis of changes in the economy using an I-O model sometimes is called multiplier analysis. The multiplier in a particular analysis is the ratio of the total impact to the direct impact. For instance, if the new factory will have 10 more on-site workers, and the economist with the aid of the I-O model has figured the total job creation to be 35 jobs, the multiplier impact is a 3.5 ratio. RIMS II provides users with multiplier tables for estimating the impacts in the form of changes in employment. If, for example, data are presented concerning change in the final demand¹⁶ in a particular industry, the corresponding final-demand multiplier for employment can be used to estimate the total impact on regional employment. Or, if data on the initial changes in employment are available, then the corresponding direct-effect multipliers for employment can be used to estimate the total impact on regional employment. The RIMS Handbook is a helpful resource for the entry-level understanding of terminology used. The multiplier tables are compiled by the BEA-RIMS II staff through many runs of the underlying I-O model to ascertain the impact of a change in final demand in each industry represented in the model. Rather than make the I-O model available publicly, the tables of multipliers are for sale.

Although IMPLAN and other I-O models do not operate from tables of multipliers as RIMS II does, the request from USCIS for a multiplier can be met by calculating multipliers from the outputs of these models. Users of IMPLAN can input both projected revenue and employment assumptions, and can modify assumptions about labor compensation or local sourcing of inputs, and therefore a single multiplier might not suffice. Instead, users should enter all appropriate input assumptions, let the model calculate outputs, and then use the output information provided by the model to estimate the multipliers requested by USCIS. If the model is driven by a direct employment estimate, then the appropriate multiplier is the ratio of total employment to direct employment. If the model is driven by a direct revenue or expenditure impact, the appropriate multiplier is the ratio of total employment to the revenue or expenditure impact. If the model is driven by simultaneous multiple input assumptions, the preferred approach is to show a different multiplier for each input assumption. However, in the latter case the individual multiplier is merely illustrative and cannot be used to estimate total future impacts, since the I-O model depends on the multiple input assumptions to estimate total future impacts.

By convention, revenue and expenditure multipliers are usually presented in total jobs per million dollars for revenue or expenditure. This convention usually keeps the ratio in the same order of magnitude as employment multipliers. One might expect a direct employment multiplier to fall within 1 and 5 total jobs per direct job, and a revenue multiplier will typically fall in a range of 10 to 20 total jobs per million dollars of revenue.

Initial change data are critical to use of the I-O model. Indeed, when one speaks of the "job creation methodology" that supports EB-5 petitions, the particular I-O model and the initial change data are the essential components of that methodology. The data may include initial changes in employment,



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check out AILA's
[Immigration Options
for Investors and
Entrepreneurs, 2nd Ed.](#)
(AILA 2010).

¹⁶ "Final demand" consists of goods and services available for consumption, investment, government operations, or exports. It is distinguished from "intermediate goods and services," which are used to produce goods and services delivered to final demand. The RIMS II Handbook explains that it is common in regional impact analysis to refer to "change in final demand" instead of "change in output delivered to final users."

revenues, or expenditures of a business. Expenditure projections are a useful approach, for instance, when an enterprise will not have input requirements (*i.e.*, what is required for production) typical of the industry in which it is classified because of the use of innovative technology. Initial change data are expressed in terms of either a change in demand in the initially affected industry, a change in earnings or employment in the initially affected industry, or the change in the initially affected industry's input requirements. In the case of a manufacturing plant investment, for example, the developer of an EB-5 investment may reasonably estimate that the investment of EB-5 capital would have the impact of increasing employment at a manufacturing plant by 50 full-time positions. This is a straightforward example of the initial change data that may be input to the I-O software.

In some situations, the direct employment impact of an investment might displace jobs at some other location within a study region. A new state-of-the-art supermarket might eliminate the village grocer. Where there is an obvious connection between the newly arrived business and the displaced business, this effect is called displacement, and it may lead an economist to reduce a total jobs projection by a factor that takes the degree of displacement into account, based on a survey or some other form of analysis. If so, the reduction is made to the initial change data prior to use of RIMS II multipliers or the IMPLAN I-O software. Note that proponents of the REDYN model claim that it has an enhanced displacement feature in its software, a feature that eliminates the need for extra analysis to model displacement effects.¹⁷

Clients occasionally question which of the I-O models is best. There is no simple answer that fits all scenarios. RIMS II works well for easy-to-analyze projects for which the analyst has been provided reliable estimates of the initial change in employment or the initial change in industry output for each sector involved. However, regional economists often encounter more complicated scenarios that perhaps are not comprehensively addressed by RIMS II. For example, one might have both initial employment changes and initial revenue changes for a particular sector. The implied ratio of revenue per employee might be different from what RIMS II assumes. The analyst is left with a choice of using either the initial change in revenue or the initial change in employment, along with the appropriate RIMS II multiplier, to predict the effect on total employment in the region. With commercial I-O models, such as IMPLAN, on the other hand, one can drive the analysis with both data inputs, and this use of the IMPLAN model arguably predicts more accurately the multiplier impacts of the scenario.

Another frequently encountered scenario is when the analyst has information about the sourcing of supplies for a particular EB-5 investment plan and that sourcing information is not consistent with the industry averages that are used in creating the RIMS II multipliers. A solar panel development, for example, might be planned assuming imported solar panels, whereas RIMS II might assume the panels would be sourced within the United States. Again, the commercial I-O models offer the user the ability to tailor the input assumptions sector by sector, a feature that RIMS II does not offer. This discussion does not imply that use of RIMS II would be inaccurate or unacceptable in such scenarios, but rather that the economist may exercise discretion in selecting an I-O model and job creation methodology that is best suited to yielding superior estimating results.

It is common practice to account for phases of economic activity. If the investment in the subject EB-5 commercial enterprise will affect two phases—construction and business operations—then separate calculations of impacts are made for each of the phases. Consequently, the estimation of job creation generally involves two types of jobs: operations-phase jobs, and construction-phase jobs. Economists normally list these two types of employment impacts separately in economic impact studies.

Total job creation impacts are commonly articulated as the sum of the direct, indirect, and induced impacts. Direct impacts are those that occur in the businesses that cause the change in final demand. Firms locating in a particular area provide a stimulus to the local area through their payrolls and purchases. From the local point of view, new jobs are created. These directly impacted firms stimulate indi-

¹⁷ This feature of REDYN is noted at http://www.redyn.com/Documentation/regionaldynamics_comparison.pdf.

rect impacts in two ways—the directly impacted firms buy goods or services (including expenditures for labor) to support their production increases, and the increased payrolls of the directly impacted firms lead to consumption purchases by their workers. Employment is created indirectly at a variety of firms by these increased purchases to support production and by the consumption purchases of employees.

Thus, economists use the term “indirect jobs” to refer to the jobs that are created when a company orders supplies to sustain its operations and the supplier adds employees to meet the higher level of demand it is experiencing. USCIS also calls these supplier jobs “indirect jobs” in the EB-5 program.¹⁸ “Induced jobs” are those that result from the new direct and indirect employees who receive paychecks and proceed to spend them. These expenditures cause a variety of firms to hire new workers and these new workers constitute the induced employment impact. Induced employment impacts are also “indirect jobs” according to USCIS definitions.

Occasionally there is a problem with confused terminology. USCIS defines “direct jobs” as those filled by employees of a new commercial enterprise invested in by EB-5 immigrant investors.¹⁹ The problem with this terminology is that economists use the term “direct” in a generalized sense to refer to economic impacts involving new economic activity related to the change in final demand. For example, if an immigrant invests in a company that hires 10 people, those are direct jobs in both USCIS parlance and regional economic terms. If a real estate developer creates new hotel facilities using financing provided by an immigrant investor, and then a hotel company leases this facility and hires employees to work at this facility, those on-site positions also are direct jobs in regional economic terms—but they are indirect jobs according to USCIS regulations. An immigrant who invests in a hotel development operation, a common form of investment carried out through the EB-5 program, is not creating direct jobs by this definition, but indirect jobs.²⁰ Readers will be aware by now that any use of the terms “direct” or “indirect” in an economic impact study may have multiple meanings, and definitions appropriate to the particular I-O model being used must be kept in mind.

Employment impact estimates are not intended to identify the nature of the particular jobs, whether certain employees are actually working full-time or part-time, or whether a worker is an employee or independent contractor. The available I-O models do not provide any differentiations of employment impacts along these lines because the underlying survey data do not make such distinctions. However, census and Bureau of Labor Statistics data might be used in some instances to show the occupational distribution of jobs that are likely to be created in certain industries, or to comment on the likelihood of part-time work. More important, USCIS has recognized that I-O models typically do not distinguish between full-time and part-time jobs, and therefore USCIS has instructed its examiners to presume that indirect jobs are full-time and qualifying for EB-5 purposes.²¹

A final observation is required on the subject of the geographic reach of the indirect job creation. Following solid economic principles, USCIS has concluded that the EB-5 investor is permitted to claim credit for indirect job creation that may reach beyond the boundaries of the regional center geographic area.²² By design, I-O models capture the job creation that ripples throughout an economy due to a stimulus, but which of course dissipates over distance. In working with the I-O software (or RIMS II multiplier tables), the economist is required to indicate the geographic focus of the analysis. In determining what geographic scope to specify, the economist must consider a number of different factors,

18 AFM §22.4(a)(2)(A).

19 8 CFR §204.6(e), defining “employee”; AFM §22.4(a)(2)(A).

20 USCIS acknowledged the occasional confusion with terminology at the EB-5 Immigrant Investor Program Stakeholder Meeting, Dec. 16, 2010, PowerPoint slide 28, *published on AILA InfoNet Doc. No. 11010732 (posted Jan. 7, 2011)*.

21 AFM §22.4(c)(4)(D)(iii).

22 See USCIS, Office of the Director, A. Mayorkas, Letter to Senator Patrick Leahy, Dec. 3, 2010, *published on AILA InfoNet at Doc. No. 10122135 (posted Dec. 12, 2010)*, in which Mayorkas stated: “[W]e agree that a regional center may rely on jobs indirectly created outside its geographic boundaries.” This definitive statement clarified the significant confusion caused by the USCIS presentation in an EB-5 Immigrant Investor Program Stakeholder Meeting, Oct. 14, 2010, PowerPoint slides 34–38, *published on AILA InfoNet at Doc. No. 10101537 (posted Oct. 15, 2010)*.

such as the inter-county commuting patterns of workers in multiple contiguous counties.²³ Thus, the inclusion of extra-regional center area job creation makes sense, as the breadth of the regional center geographic area is not necessarily linked to any economic rationale; some regional center areas, as approved by USCIS, are inexplicably vast, covering entire states, while others appear to be comparatively tiny and focused on a narrowly identified area of a specific city. Because of the reluctance alluded to above, we discuss neither the current wisdom at USCIS in terms of acceptable geographic boundaries for regional center designation nor the subject of regional center designation generally.

Estimating Operations-Phase Jobs

Job creation in the operations phase is estimated first by identifying the initial change data—the change in on-site employment, or the change in revenues, that can be said to result from the infusion of capital. These data are derived from either a specific forecast concerning the business, assumptions about likely future business activity, or an evaluation based on comparable undertakings by other businesses.

A simple example: An aerospace company will use EB-5 capital to build a new manufacturing plant where there will be 100 new full-time workers following construction and installation of equipment. Assuming RIMS II is used, and the multiplier tables for Los Angeles County are applied, the multiplier is 4.6718 and total job creation would be 467.2 jobs (which follows from 4.6718 x 100).

RIMS II Multipliers (2002/2007)
Table 1.5 Total Multipliers for Output, Earnings, Employment, and Value Added by Detailed Industry
Los Angeles County CA (Type II)

INDUSTRY	Multiplier					
	Final Demand				Direct Effect	
	Output ^{1/} (dollars)	Earnings ^{2/} (dollars)	Employment ^{3/} (jobs)	Value-added ^{4/} (dollars)	Earnings ^{5/} (dollars)	Employment ^{6/} (jobs)
336411 Aircraft manufacturing	2.0190	0.3921	6.7284	0.9055	2.8806	4.6718

Source: Bureau of Economic Analysis, U.S. Dept. of Commerce

Another example: A new hotel will come into existence because of EB-5 investment, and the operating revenue is forecast to be \$20 million annually. Using IMPLAN, and applying the model for Los Angeles County, an estimated 230.1 jobs would be created as a result of the new hotel, with the allocation being 162.7 direct jobs, 32.7 indirect jobs, and 34.7 induced jobs.

Impact Type	Employment	Labor Income	Value Added	Output
Direct Effect	162.7	\$6,982,248	\$12,720,746	\$19,999,999
Indirect Effect	32.7	\$2,145,655	\$3,223,744	\$6,196,368
Induced Effect	34.7	\$1,748,898	\$3,167,916	\$5,442,542
Total Effect	230.1	\$10,876,801	\$19,112,406	\$31,638,911

Source: IMPLAN model results screen

Although the above examples are straightforward, as they involve EB-5 investments for known uses and immediately ascertainable initial change data, several types of complications can arise in ordinary EB-5 cases in terms of identifying the initial change data that are used as input to the I-O model. First, using the hotel example, the estimate of future revenues may require calculations and pro forma statements based on revenue-per-room or similar studies that are provided by industry experts. Investments of EB-5 capital into other industries provide similar opportunities to utilize industry-specific studies

²³ See also similar USCIS comments at the EB-5 Immigrant Investor Program Stakeholder Meeting, Oct. 14, 2010, PowerPoint slide 28, published on AILA InfoNet at Doc. No. 10101537 (posted Oct. 15, 2010), and at the EB-5 Immigrant Investor Program Stakeholder Meeting, Mar. 17, 2011, published on AILA InfoNet at Doc. No. 11010633 (posted Mar. 17, 2011).

to corroborate the impacts of capital investment on output. Such studies must be invulnerable to attack by USCIS as outdated or as irrelevant to the particular geographic market.

Another likely complication exists where the EB-5 capital is used to build out space and the EB-5 investors desire to claim job creation credit for the future tenants of the building. Until recently, it had been common practice for developers to predict who the likely future users of the building would be, using categorizations such as “professional,” “retail,” or “warehouse,” and with the application of industry space usage standards framed in terms of workers per square feet, also to estimate the likely number of workers that would occupy the built-out premises and to use that as the initial change data for calculation of operations-phase jobs. Use of square feet per job estimates from planners, or the surveys done by the Energy Information Administration (EIA) have proven useful.²⁴ In some regions of the country, a regional council of governments or some other organization may have surveyed local businesses to determine the relationship between the building space occupied by companies in a particular industry and the number of employees. However, as of February 17, 2012, USCIS announced it had undertaken a comprehensive review of what it calls “tenant occupancy” methodology. In the adjudications that followed immediately thereafter, USCIS declared that where EB-5 capital is used merely to develop real estate for the facilities of businesses and the EB-5 investor claims job creation credit for the employees of such businesses, it appears the nexus between the investment and job creation is too attenuated or incomplete to constitute a basis for a reasonable job creation methodology. Credible claims of job creation could be made for the construction-phase jobs, as well as for the operations-phase jobs in building management, according to these adjudications. But for the investor to claim credit for more than that — to include the employees in the operations of the tenant businesses as initial change data — USCIS would require an economically acceptable nexus. Market studies must indicate that prospective tenants experience “excess demand” such that the lack of a specific kind of building space has constrained business expansion; the “pent up” demand for the specific services provided by such tenants is evident; and the claimed job creation is due to expansion, not merely tenant relocation.²⁵ How this will play out remains to be seen for the many regional center groups and their investors who are affected. But one immediate thought is that if built-out space has been significantly customized to suit the needs of a particular tenant, and there is no similar customized space in the area, the required nexus may exist.

Note that the initial change data for estimating operations-phase jobs could consist of the dollars invested into the commercial enterprise, in certain circumstances. For example, some regional center entities have been approved by USCIS based on a job-creation methodology that assumes that the industry focus of the EB-5 investment is known, but the specific “job-creating business”²⁶ is not known. In this regard, USCIS approved in several instances a methodology that uses commercial ratios (derived in certain published studies of publicly traded companies) that convert the increase in the assets of a company in a specific industry to increased revenue. Following that conversion, the resulting revenue change can be input to the I-O model. Thus, in effect, the estimate of job creation can be founded on the total dollars invested to increase the capital base of a particular business.

24 http://www.eia.doe.gov/emeu/cbeccs/cbeccs2003/detailed_tables_2003/detailed_tables_2003.html. According to some reports, industry standard practice is to recognize the employees of tenants as counting toward job creation. *See, e.g.*, S. Fuller, “How to Calculate the Economic Contribution of Office, Industrial and Retail Real Estate to the Local Community” (National Association of Industrial and Office Properties 2005), available at <http://www.naiop.org/foundation/calecon.pdf>.

25 USCIS Office of Public Engagement, “Tenant Occupancy” announcement (Feb. 17, 2012), published on AILA InfoNet at Doc. No. 12022160 (posted Feb. 21, 2012). The adjudication activity by USCIS with respect to the “tenant occupancy” methodology is so fresh (and still surfacing) that no effort is made here to showcase the many counterarguments that certainly will be made in the next weeks and months based on both economics and legal principles. AILA’s EB-5 Investor Committee has submitted a response to USCIS, published on AILA InfoNet at Doc. No. 12041042 (posted Apr. 10, 2012).

26 Recent writings of USCIS distinguish between the “new commercial enterprise,” which is legal terminology grounded in statute and regulations, and the “job-creating business,” which is intended to signify the employer entity. *See* EB-5 Immigrant Investor Program Stakeholder Meeting, Mar. 17, 2011, published on AILA InfoNet at Doc. No. 11010633 (posted Mar. 17, 2011), PowerPoint slide 56.

The above examples involve different routes for ascertaining initial change data that can be used to estimate total employment creation in the operations phase. In the typical scenario, these initial change data are input to a recognized I-O model, such as RIMS II or IMPLAN. But the flexibility of the EB-5 statute and regulations also permits an expert analysis that would forgo the typically used I-O models altogether, and would use a region-specific I-O model, such as exists in the state of Washington, or would derive multipliers independent of the standard published I-O models as long as the economic analysis and job creation predictions withstand the test of reasonableness. The investment plan, demographics, and economic factors of a particular region of the country may compel the economist to pursue this independent track. As the recent, still unfolding experience with the tenant occupancy methodology attests, one can anticipate further USCIS scrutiny of such methodologies.

Estimating Construction-Phase Jobs

The analyst estimates construction-phase jobs by using as input the total dollars expended on construction. Thus, assuming use of RIMS II, if all EB-5 capital is used toward construction expenditures, the total construction-phase job creation is easily calculated by using the total EB-5 capital and the final demand multiplier for construction in the particular geographic area.

The depiction below would be suited for a \$30 million expenditure (after conversion to 2007 dollars) on hotel construction in Los Angeles County. The outcome would be 406 total construction-phase jobs. The calculation is 30×13.5481 because final demand in the construction industry changed by \$30 million, so the final demand/employment multiplier is used.

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Los Angeles County CA (Type II)

INDUSTRY	Multiplier					
	Final Demand			Direct Effect		
	Output/1/ (dollars)	Earnings/2/ (dollars)	Employment/3/ (jobs)	Value-added/4/ (dollars)	Earnings/5/ (dollars)	Employment/6/ (jobs)
230000 Construction	2.0958	0.5790	13.5481	1.1285	1.9054	2.0222

Source: Bureau of Economic Analysis, U.S. Dept. of Commerce

The total expenditure usually is deflated to dollars of the year used in the particular RIMS II multiplier table, in order to correlate the expenditure to the dollar figures used in the I-O model. Note that the title of the RIMS II table states that these are “RIMS II Multipliers (2002/2007).” Scrutiny of footnotes and other documents shows that 2002 refers to the year the survey data in the model were collected, and that all dollar values in this multiplier table are stated in 2007 dollars. Thus any dollar values used in the analysis must be converted from the current year to 2007 values, using an index such as the Consumer Price Index or the Producer Price Index.²⁷ For construction expenditures, the Producer Price Index is more appropriate.

More important, analysts also should factor in any domestic source capital, calculating the total dollars expended on construction. USCIS has allowed EB-5 investors to claim credit for job creation that results from domestic capital formation,²⁸ and where there is a reasonable nexus between the other source capital and the infusion of EB-5 capital, it is reasonable to include in the calculation other source capital that has been expended toward construction. Consequently, using again the example above, if (after deflating dollars) EB-5 capital accounted for \$30 million of construction expenditure, and other source capital accounted for another \$30 million of construction expenditure, the total construction-phase job creation would be double, or 812 jobs. Proponents of this approach, however, should anticipate further USCIS scrutiny and demands for specific documentation of the other source capital.

27 For information about these indexes, go to <http://www.bls.gov/bls/proghome.htm> and select “subject areas.”

28 8 CFR §204.6(g)(2).

The analysis should not automatically assume that all EB-5 invested capital is qualified as an input to the construction multiplier. Some EB-5 capital likely will be spent on items that may be legitimate EB-5-compliant expenditures but are not accurately characterized as construction expenditures. Capital used to acquire land, to purchase equipment, and otherwise used to support company operations may be considered as job creating but it might not be capital used for construction expenditures.

A related issue arises where the EB-5 capital becomes available and is expended after the initial construction expenditures have been made. Perhaps the EB-5 capital is to be used to pay back debt that was incurred to fund construction expenditures. Although this scenario is not directly a matter for the principles of regional economics to resolve, the economist may prove helpful in explaining the rational connection or reasonable nexus between the bridging of funds to make initial construction expenditures in anticipation of the later infusion of EB-5 capital. Recently, USCIS has indicated such repayment of debt is a legitimate use of EB-5 capital and corresponding job creation may be credited to the EB-5 investor where there is a reasonable nexus.²⁹ The language used in certain recent USCIS adjudications (*i.e.*, in petition denials) also shows acceptance of this concept; however, examiners may deny a petition where there is insufficient documentation of the nexus between the construction expenditures and the later-received EB-5 capital. As examiners have proclaimed, the EB-5 program was not intended merely to facilitate the refinancing of capital that already was invested to create jobs.³⁰

Because of USCIS pronouncements relating to construction-phase jobs, it is also important to consider the length of the construction period. If the construction will exceed a two-year period, USCIS says that all the construction-phase jobs—including direct, indirect, and induced—can be claimed by EB-5 investors.³¹ In the case of construction of shorter duration, USCIS says that only the indirect (including induced) construction-phase jobs can be claimed.³²

To illustrate the practical effect of such a position on construction-phase employment that can be claimed by the EB-5 investor, consider again a hotel construction project. If it costs \$70 million to build a hotel (not counting land acquisition or permitting costs, *i.e.*, assuming a “hard construction cost” of \$70 million), the total construction-phase jobs can be estimated as 709.8 jobs, including 448 direct jobs, 145.3 indirect jobs, and 116.6 induced jobs. That result is based on IMPLAN for Los Angeles County.

Impact Type	Employment	Labor Income	Value Added	Output
Direct Effect	448.0	\$22,365,259	\$23,693,788	\$69,999,998
Indirect Effect	145.3	\$8,232,333	\$12,657,711	\$24,461,514
Induced Effect	116.6	\$5,871,279	\$10,642,157	\$18,278,046
Total Effect	709.8	\$36,468,871	\$46,993,656	\$112,739,557

Source: IMPLAN model results screen

If the construction project is to last less than two years, then, under USCIS guidelines, the sum of indirect and induced jobs, 261.9 jobs in this example, can be claimed for EB-5 job creation credit. But the direct effect of 448 construction-phase jobs cannot be counted.

29 See USCIS comments on questions raised at the EB-5 Immigrant Investor Program Stakeholder Meeting, June 30, 2011, published on AILA InfoNet at Doc. No. 11050462 (posted June 30, 2011); see also USCIS Memorandum, A. Mayorkas, “A Work in Progress: Towards a New Draft Policy Memorandum Guiding EB-5 Adjudications,” Nov. 9, 2011, published on AILA InfoNet at Doc. No. 11110938 (posted Nov. 14, 2011), p. 12.

30 The AAO recently upheld termination of a regional center on account of documentation indicating that EB-5 capital would be invested to replace earlier financing that had no connection with the later-invested EB-5 capital. It concluded the regional center does not promote economic growth if EB-5 funds are invested only after job creation is completed. *In Re Regional Center of Victorville Development Inc.*, RCW 103 1910251, AAO Dec. 21, 2011, published on AILA InfoNet at Doc. No. 12021367 (posted Feb. 13, 2012).

31 USCIS Memorandum, D. Neufeld, “EB-5 Alien Entrepreneurs—Job Creation and Full-Time Positions,” June 17, 2009, at 5, published on AILA InfoNet at Doc. No. 09061964 (posted June 19, 2009).

32 USCIS, Office of Congressional Relations, J. McCament, Letter to Sen. John Cornyn, Jan. 16, 2009, published on AILA InfoNet at Doc. No. 09011680 (posted Jan. 16, 2009).

From the point of view of reliability and legal authority, it cannot be emphasized enough that although USCIS presently allows at least the indirect aspects of construction-phase job creation to be claimed by EB-5 investors, disconcertingly, the USCIS position is merely an informal one. That is, notwithstanding prevailing adjudication practice, and putting aside the legal ramifications of any future changes, the prevailing position today could be changed with little or no warning.

Documentation Accompanying I-526 and I-829 Petitions

When considering the documentation on job creation that should accompany individual investor petitions that are filed with USCIS, it again bears repeating: Several of the “rules” that EB-5 practitioners are guided by might not be rules at all, not in the sense that the government might view its practices to be constrained by the legal niceties of advance notice and opportunity to comment before changing such rules. The *Chang* case³³ appears to place limits on the government’s discretion to apply changed adjudication standards with the consequence of adversely impacting an investor where that investor already is a conditional permanent resident. However, that is no solace for either the investor who has not yet advanced to permanent resident status or for the regional center entity that is intent on planning an attractive EB-5 investment based on certain expectations about job creation standards. (Consider the millions of dollars lost by regional centers and developers expecting to be able to rely on tenant occupancy methodology.) In any event, the malleable nature of USCIS adjudication standards in the EB-5 program is a discussion for another day. Genuine concern for stakeholder expectations would dictate that any change in job creation standards would be effective prospectively only.³⁴

The Economist’s Report

The statute requires that indirect job creation be documented by “reasonable methodologies,” but omits specifics. Regulations require evidence in support of the initial I-526 petition that demonstrates the investment will create 10 jobs either directly or indirectly through revenues generated from increased export sales,³⁵ but a later statutory revision modified if not eliminated this linkage to export sales as a necessary item of proof.³⁶ The regulations provide that job creation methodologies may consist of multiplier tables, feasibility studies, and other economically or statistically valid forecasting devices.³⁷ This is the broad legal authority for the work of the economist in EB-5 practice.

Whether the methodology involves multiplier tables, feasibility studies, or some other forecasting device, the touchstone for determining that the proposed method for estimating job creation is a reasonable methodology is the quality of evidence of initial change data. Are the initial change data (*e.g.*, the estimated increase in annual revenue) rationally based, and are they reasonable in the micro- and macro-economic circumstances? USCIS is sensitized to the maxim “garbage in, garbage out” and consequently will likely subject the methodology’s assumptions to some form of test of reasonableness.³⁸ If nothing else, the current controversy concerning tenant occupancy methodology signals unambiguously that USCIS is prepared to be combative and may dismiss the economist’s analysis.

The initial change data can be reliably presented in the company’s business plan if that is reasonable in its forecasts, industry studies, or comparisons with other similar projects or businesses that are already in operation. When estimating future revenues of a business, the economist will use a pro forma financial projection created by the company management or financial advisors. The projection may be subjected to

33 *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

34 USCIS recently seemed to acknowledge as much insofar as the “Tenant Occupancy” announcement suggested that any new standards would be applied prospectively only. However, it is now clear from current adjudications that new USCIS standards are being applied not only to proposals for new regional centers but also to “reopen” already-approved regional center designations and to revoke already-approved I-526 petitions.

35 8 CFR §204.6(j)(4)(iii).

36 Pub. L. No. 102-395, Title VI, §610(c), Oct. 6, 1992, 106 Stat. 1874, as amended by Pub. L. No. 106-396, Title IV, §402, Oct. 30, 2000.

37 8 CFR §204.6(m)(7)(ii).

38 Note the EB-5 Immigrant Investor Program Stakeholder Meeting, June 30, 2011, PowerPoint presentation, published on AILA InfoNet at Doc. No. 11050462 (posted June 30, 2011), and the accompanying comments of the USCIS economist.

some rather simple questions about the reasonableness of future business success, in light of past history and the experience of competitors in the same business sector. Similarly, when estimating expenditures, it may be advisable to interview the accountants associated with a comparable enterprise, or to use data culled from industry reports. The job creation reports that refer to efforts made to test the validity and reasonableness of the company's projections are likely to be given greater weight by the USCIS examiner.

The Form I-526 petition the investor files with USCIS is forward-looking and may be based on an estimate of future job creation.³⁹ USCIS interprets the law to require the investor to provide a comprehensive business plan with an estimate of the requisite job creation to occur within 2½ years of the adjudication of the I-526 petition.⁴⁰ Consequently, the job creation report must be attuned to when the estimated job creation will occur, which typically is addressed by way of a timeline graph or chart and an accompanying explanation within the economist's report.

A job creation report will clearly explain the particular I-O model used and the results of the analysis, setting forth the total estimated job creation in the construction phase and separately in the operations phase. The report also should provide separate figures for direct, indirect, and induced job creation.

As indicated above, USCIS frequently requests the actual multiplier tables, which are available when the methodology is based on RIMS II. Otherwise, when RIMS II is not the I-O model used, the economist may calculate the multipliers for USCIS and include them in the job creation report.

Also, a job creation report should provide the NAICS codes⁴¹ for all industry sectors, and, if possible, the sector codes from the I-O model used to project indirect impacts. USCIS seems to be aiming toward a standard of transparency that would allow an independent analyst to replicate the results, requiring that these codes be included in the reports.

Regional Center Affiliation

Each I-526 petition based on investment in a regional center–affiliated commercial enterprise must be linked in some way to the regional center and its designation previously granted by USCIS (or legacy INS). Otherwise, the I-526 petition cannot include the benefit of indirect job creation. There is no existing published rule on exactly how that linkage is to be documented.

Since the 1990s, when legacy INS first approved regional centers, each regional center designation is represented in an approval letter (or letters) issued by legacy INS or USCIS. Therein one finds the essential attributes of the regional center's designation. These letters are not available to the public via the USCIS website or otherwise; therefore, it is important in all instances to obtain and review the details of such letters for the particular regional center promptly.

Prior to November 23, 2010, when USCIS implemented Form I-924 for regional centers, the designation letters for regional centers followed a format that was not necessarily fixed, as it had been evolving over time. Hence, approval letters issued in 2009 and earlier are markedly different from the more recent approval letters issued by USCIS. With respect to certain regional centers that have existed since the mid-1990s, for example, their approval letters and thus their charters for EB-5 investment allowed a broader scope of business activity. Only the geographic area was narrowly prescribed. Now, with the Form I-924 in effect as well as its \$6,230 filing fee, newer regional centers are tied to specific industry sectors, certain NAICS codes, and particular “projects” that have been specifically identified in the regional center proposal or the request to amend the regional center designation.

³⁹ 8 CFR §204.6(j)(4).

⁴⁰ AFM §22.4(c)(4)(D)(ii). There is an argument that a regional center–affiliated investor is not subject to the same time parameters for job creation; 8 CFR §204.6(j)(4)(iii), relating specifically to petitions filed under the “immigrant investor pilot program” (and in contrast to “general” petitions and “troubled business” petitions), does not require a business plan providing for job creation within a certain timeframe.

⁴¹ The North American Industry Classification System is the standard used by federal agencies to classify business establishments. See <http://www.census.gov/eos/www/naics/>

In the new era prescribed by the Form I-924, the regional center approval letter will indicate the specific entity approved as a regional center; the geographic scope of the regional center; the approved “investment activity” or “economic activities”; the target “industry economic categories” (or industry sectors); and the specific I-O model identified in the regional center proposal.⁴²

In order to demonstrate regional center affiliation, according to recent regional center approval letters, the I-526 petition should be supported by copies of:

- The regional center approval letter;
- The regional center “narrative proposal and business plan”;
- The “job creation methodology”; and
- The “USCIS approved documents”—such as offering memorandum, subscription agreement, escrow agreement, and partnership agreement.

These requirements do not appear in the regulations but exist only informally via the regional center approval letters that USCIS presently issues.⁴³

Transition from Regional Center Approval to I-526 Petition Approval

The approval of a regional center does not necessarily translate into approvals of individual investor petitions for investments affiliated with that regional center. Any one of several hurdles may exist as a barrier to the investor.

First, USCIS has approved regional centers based on a general plan for investment including a specific hypothetical commercial enterprise for the EB-5 investors, but then denied the individual investors’ I-526 petitions based on the very same commercial enterprise identified in the regional center proposal. This disconnection, or what seems to be a raw example of the right hand not knowing what the left hand is doing, of course comes at great expense to the regional center principals and the investors and with the loss of potential job creation. Notwithstanding regional center approval, USCIS has indicated that an I-526 petition cannot be approved for a commercial enterprise if USCIS cannot discern on review of the I-526 petition exactly what “job creating enterprises” would be using the EB-5 capital.⁴⁴

The Administrative Appeals Office (AAO) has upheld denial of I-526 petitions where there was a post-filing material change to the business plan, observing that even though an amendment to the regional center designation had been approved, further changes in the form of substantially revised arrangements for project financing might alter the employment creation estimates.⁴⁵

Following a slightly different rationale, USCIS could deny the I-526 petitions affiliated with an approved regional center if it determines there has been change from what was approved for the regional center. At least informally, in various pronouncements, USCIS has indicated that if any of the factors articulated in the regional center approval letter change, an investor’s I-526 petition may not be based on the regional center affiliation unless there has been an approved amendment that covers the particular change.⁴⁶ This focus on change—on the deviation from what has been proposed at the regional center level compared with what is submitted with the individual investor’s petition—could doom an individual investor’s I-526 petition even where USCIS appeared to have approved the “capital investment project” based on an “exemplar petition” filed with the regional center proposal. Considering that

⁴² See [Form I-924 and instructions](#).

⁴³ Also, AFM §22.4(c)(3) instructs the examiner to request the regional center approval letter, and documentation concerning the “capital investment structure” and “job creation methodology.” Note, too, regional center approval letters typically state that the Form I-829 petition must demonstrate that the activities described in the I-526 petition have been performed, and are based on the same regional center job creation methodology.

⁴⁴ See, e.g., EB-5 Immigrant Investor Program Stakeholder Meeting, Mar. 17, 2011, PowerPoint presentation, *published on* AILA InfoNet at Doc. No. 11010633, *posted* Mar. 17, 2011.

⁴⁵ This is a non-precedent decision, *Matter of [name not provided]*, WAC-09-007-51516, AAO Sept. 21, 2010, *published on* AILA InfoNet Doc. No. 10092180 (*posted* 9/21/10). The import of this decision might be confined to the AAO’s determination that changes to business documents cannot cure the ineligibility existing at the time of filing the I-526 petition.

⁴⁶ AFM §22.4(a)(2)(E).

the time passage from filing a regional center proposal to the adjudication of an individual investor's I-526 petition is likely to be far beyond one year, it is highly improbable that there would be no change at all to a planned EB-5 investment by the time USCIS adjudicates the I-526 petition. This reality casts significant doubt over the reliability of the exemplar petition process, thus adding to the immigration risks attendant on the EB-5 process.

With respect to job creation methodology, the tenant occupancy controversy demonstrates that USCIS may set aside its determination that a particular job creation methodology is acceptable. This raw exercise of agency power is yet another reminder that players in the EB-5 "game" may share the gambler's sensation of rolling the dice.

A separate question is whether EB-5 investors are stuck with a particular I-O model. Although Form I-924 is not immediately applicable to individual investor petitions, the instructions to Form I-924 state that a regional center must seek amendment if there is change to the regional center's "capital investment projects," which is meant to include "changes in the economic analysis and underlying business plan used to estimate job creation for previously approved investment opportunities and industrial clusters." But the Form I-924 instruction to approved regional center entities is ambiguous with respect to its application to individual investors. One could argue, for example, that there is no change in the job creation methodology or the economic analysis merely because of a change in the I-O model (say, for example, from IMPLAN to RIMS II) used by the economist to estimate total job creation. Regional center approval letters issued prior to 2010 typically did not identify a particular I-O model underlying the approved economic analysis. Most economists will state with confidence that the I-O model should not make a difference to the overall job creation methodology, as the I-O model is merely a tool or an interchangeable component part of the overall job creation methodology. Nonetheless, caution is advised until USCIS clarifies the matter.⁴⁷

Removal of Conditions

Whereas the I-526 petition the EB-5 investor initially files with USCIS is forward-looking and the law clarifies that it may be based on an estimate of future job creation, the law concerning the adjudication of the I-829 petition for removal of conditions has been muddled by different explications of what the law requires.⁴⁸ The statute concerning removal of conditions does not even mention proof of job creation as a requirement for removal of conditions.⁴⁹ The statutory concern is with "sustaining" the commercial enterprise,⁵⁰ as opposed to achieving a milestone accomplishment, such as a certain level of job creation. This makes sense insofar as the purpose of conditional lawful permanent residence for investors is to deter fraud, not to erect certain standards of completed job creation as a condition for removal of conditions.⁵¹ Nonetheless, the regulations for removal of conditions impose on the investor

47 Although USCIS has stated informally that a change in I-O model requires an amendment (EB-5 Immigrant Investor Program Stakeholder Meeting, Mar. 17, 2011), there is a USCIS memorandum that opens up the possibility that an amendment would not be required. USCIS Memorandum, A. Mayorkas, "A Work in Progress: Towards a New Draft Policy Memorandum Guiding EB-5 Adjudications," Nov. 9, 2011, published on AILA InfoNet at Doc. No. 11110938 (posted Nov. 14, 2011).

48 See, e.g., L. Stone, "Conditional Permanent Residence and Immigration Risk for Investors," *Immigration Options for Investors & Entrepreneurs* (AILA 2d Ed. 2010), pp. 165-92; L. Stone, "The Certainty of Change and Risk in Investment Immigration," *Immigration Daily* (Sept. 21, 2010).

49 INA §216A(d)(1).

50 INA §216A(d)(1)(A)(ii). The regulation, 8 CFR §216.6(a)(4)(iii), provides that the investor has sustained the investment if in good faith the investor substantially met the capital investment requirement and continuously maintained it. The intent is to interpret the provision with "maximum flexibility" and to subject it to "liberal interpretation." Commentary to Final Rule, 59 Fed. Reg. 26588 (May 23, 1994).

51 Investors are "admitted as conditional permanent residents as a means to deter immigration-related entrepreneurship fraud." Commentary to Final Rule, 59 Fed. Reg. 26588 (May 23, 1994), quoting S. Rep. No. 101-55, 101st Cong., 1st Sess. 22 (1989). Congress rejected an earlier proposal that would have required all jobs to be created within a two-year period of making the investment, 134 Cong. Rec. S2119 (1988), as well as another proposal that would have required all job creation to occur within a reasonable time but no later than six months after the investor's admission to the United States. S. Rep. No. 101-55, at 21 (1989). USCIS articulated a different position on job creation and adjudication of the I-829 petition in a June 2009 memorandum, adding new language to AFM §25.2(e)(1), that states that the primary purpose of the I-829 adjudication is to determine the petitioner "has invested the requisite capital and created the requisite jobs through that investment." See USCIS Memorandum, D. Neufeld, "EB-5 Alien Entrepreneurs—Job Creation and Full-Time Positions," June 17, 2009, at 5, published on AILA InfoNet at Doc. No. 09061964 (posted June 19, 2009).

the obligation to prove that jobs have been created or will be created within a reasonable time.⁵²

In light of the requirement of the regulations, every I-829 petition should include documentation relating to job creation. The supporting documentation takes various forms, depending on the circumstances. If the initial I-526 petition was based on a job creation report that assumed certain factual propositions, and the actual facts turned out to be significantly different (say, for example, the initial revenue forecasts were overoptimistic when compared with actual subsequent performance), it may be helpful to submit an updated job creation report that uses as inputs the actual performance data of the business rather than outdated initial projections. Indeed, a full-fledged report may not be necessary; instead, a simple letter may suffice, applying the same job creation methodology to a different set of facts.⁵³

Of importance to planning for the I-829 petition is that USCIS has devised an adjudication approach whereby cases involving new direct jobs must be supported by payroll records, W-2s, quarterly employment tax reports, and Form I-9s, including proof of U.S. citizenship or lawful permanent resident (LPR) status, for all workers.⁵⁴ The absence of proof concerning citizenship or residence status for direct workers could undermine the applicability of the entire methodology for crediting indirect employment.⁵⁵ Also, USCIS has stated in its regional center approval letters that if the job creation estimate is rooted in revenues or expenditures, the I-829 petition must demonstrate that those events have occurred. These requirements can be a heavy burden and difficult to satisfy. Accordingly, in preparing reports for USCIS, economists need not only to carefully present direct employment impacts and the multiplier impacts that flow from the direct impacts, but they also need to characterize the direct impacts as direct jobs or indirect jobs per the USCIS directives, because different documentation standards will be applied at the removal-of-conditions stage of the immigration process.

Presumably, where an entire case is based on indirect jobs, USCIS is content to have documentation of “performed activities” as sufficient proof to support a reasonable methodology. For example, rather than supply W-2s for employees in jobs that have been indirectly created, past successful practice has consisted of presenting evidence that EB-5 funds were fully expended as planned.

52 8 CFR §216.6(a)(4)(iv). Note, however, a close review of the architecture of the regulations for removal of conditions, promulgated just one month after the regulations for the Pilot Program, reveals a strong argument (involving the distinction in the terms “qualifying employees” for “general” petitions and “persons” for “regional center” cases) that the job creation regulation does not apply to I-829 petitions based on regional center investment. See L. Stone, “Conditional Permanent Residence and Immigration Risk for Investors,” *Immigration Options for Investors & Entrepreneurs* (AILA 2d Ed. 2010), p. 189.

53 The scrutiny of job creation results should not include revisiting the original acceptance of the job creation methodology; the AAO has said as much in a non-precedent decision, *Matter of [name not provided]*, [file number not provided] (AAO April 14, 2011), p. 15, published on AILA InfoNet at Doc. No. 11041480 (posted Apr. 14, 2011), basing its reasoning on *Chang v. United States*, 327 F.3d 911 (9th Cir. 2003).

54 EB-5 Immigrant Investor Program Stakeholder Meeting, Mar. 17, 2011, published on AILA InfoNet at Doc. No. 11010633 (posted Mar. 17, 2011).

55 See *Matter of [name not provided]*, [file number not provided], (AAO April 14, 2011), published on AILA InfoNet at Doc. No. 11041480 (posted Apr. 14, 2011), pp. 14–17.

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The regulations for removal of conditions, while imposing the requirement of job creation, also contemplate future job creation “within a reasonable time.” Consequently, conditions may be removed even though job creation is not yet manifest. The reasonableness of future job creation should be considered in view of the particular business as well as the general economy. An example is a new hotel business that is poised for future growth in a particular marketplace. The operators of the hotel may project that the room occupancy rate will climb from an initially low level when the hotel opens to a substantially higher and sustainable level several years in the future. At the time for filing I-829 petitions, the hotel might be in the first year of operation, when the hotel has not yet reached its anticipated level of occupancy and revenue generation. Gradually increasing occupancy and revenues over a timeframe of several years may be a reasonable basis for approval of removal of conditions. Examiners are instructed to use their discretion to gauge what is a reasonable time, and in appropriate cases to approve removal of conditions based on expected future job creation.⁵⁶ It remains to be seen to what extent USCIS examiners allow for the struggles and slow growth of businesses during the recessionary times that private-sector businesses encounter.

The controversy concerning removal of conditions where there has been “material change” during the conditional residence period is too complex a topic for this article.⁵⁷ USCIS ignited a firestorm of controversy in a December 2009 memorandum, which led to numerous stakeholder meetings featuring recurring questions about the material change concept in practice. Then, as part of the June 16, 2010, stakeholder meeting conducted by USCIS, the agency circulated an AAO decision of April 23, 2010, as an instructive decision, although USCIS did caution that the AAO decision is not a precedent decision.⁵⁸ In the AAO decision, which does not use the language of material change, the AAO instead indicated that the I-829 petition cannot be approved unless there is continuity of the “capital investment project.” In that case, consequently, the AAO upheld the decision to deny the I-829 petition where the petitioner had invested in a commercial enterprise that had terminated its loan to one company and extended a loan to a second company during the conditional residence period, although the petitioner claimed the job creation element had been met.

Suffice it to say, there is a substantial level of continuing confusion and uncertainty relative to removal of conditions for EB-5 investors, particularly as to proof of job creation. One is well advised to maintain close contact with an economist whose expertise may be important to resolving critical job creation issues in the course of USCIS adjudication of the I-829 petition for removal of conditions.

Conclusion

The role of the economist in regional center-affiliated EB-5 petitions is central to demonstrating the “reasonable methodologies” for estimating indirect job creation. Moreover, the place of regional economics in EB-5 practice is settled: A basic understanding of I-O models and a keen sensitivity to the ongoing struggles within USCIS to define acceptable job creation in regional center-affiliated investment cases are absolutely essential tools for the effective representation of EB-5 immigrant investor clients. ■

56 USCIS Memorandum, D. Neufeld, “EB-5 Alien Entrepreneurs—Job Creation and Full-Time Positions” (June 17, 2009), *published on AILA InfoNet at Doc. No. 09061964* (posted June 19, 2009), pp. 6–7, adding language to the AFM §25.2(e)(5)(D).

57 In another USCIS memorandum, USCIS announced for the first time that a petition for removal of conditions is not approvable if, following the approval of the I-526 petition, there has been material change of the “capital investment structure,” “job creation methodologies,” or “eligibility requirements” already approved in the I-526 petition. USCIS Memorandum, D. Neufeld, “Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions” (Dec. 11, 2009), *published on AILA InfoNet at Doc. No. 09121561* (posted Dec. 15, 2009). During the USCIS EB-5 Immigrant Investor Program Stakeholder meeting on June 16, 2010, USCIS distributed materials including an AAO decision and a [PowerPoint presentation](#). A series of slides concerned the subject matter of material change. One slide pronounces that the “capital investment project” must be the same in both the I-526 petition and I-829 petitions. Another USCIS slide proclaims that the “business plan” cannot be materially changed. When asked to clarify, the USCIS stated that the “capital investment project” is that layer of the business activity that is relevant to the jobs and economic analysis. Subsequently, in December 2010, USCIS posted the December 2009 memorandum for reconsideration and public comment. A more recent memorandum from USCIS Director Alejandro Mayorkas reveals a more flexible approach to changes that inevitably occur in the business world. USCIS Memorandum, A. Mayorkas, “A Work in Progress: Towards a New Draft Policy Memorandum Guiding EB-5 Adjudications,” Nov. 9, 2011, *published on AILA InfoNet at Doc. No. 11110938* (posted Nov. 14, 2011).

58 In a release dated September 8, 2010, the USCIS Office of Public Engagement issued an [executive summary](#) of the EB-5 stakeholder meeting held on June 16, 2010. It states that the AAO decision was provided to help stakeholders gain some insight on the agency’s perspective of what constitutes a “material change.”