

# JOB CREATION METHODOLOGIES FOR EB-5 IMMIGRANT INVESTORS

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## INTRODUCTION TO THE INTERSECTION OF ECONOMICS AND IMMIGRATION

Job creation is at the center of policy and practice concerning EB-5 investor immigration. Whether grounded in statute, regulation, or policy, the adjudication standards of U.S. Citizenship and Immigration Services (USCIS) require the EB-5 investor to show that an investment is creating U.S. employment for at least 10 workers.<sup>1</sup> The original EB-5 statute was interpreted to require proof that the workers are direct employees of the new commercial enterprise (NCE) that the EB-5 investor uses as the immediate investment vehicle. But in the EB-5 investor pilot legislation enacted in 1992, Congress provided for the creation of “regional centers” that would stimulate attraction of immigrant investor capital.<sup>2</sup> The EB-5 investor who invests with a regional center-associated NCE may rely on “reasonable methodologies” for estimating “indirect” job creation.<sup>3</sup> The methodologies typically are the handiwork of regional center operators in consultation with economists and immigration lawyers. Although as of this writing the Regional Center Program is not yet permanently authorized, it nonetheless gave rise to a multidisciplinary/multibillion-dollar EB-5 industry. USCIS sources indicate there are 889 approved regional centers as of December 18, 2018,<sup>4</sup> and more than 90 percent of all EB-5 investor petitions filed in recent years are regional center-associated.<sup>5</sup> This article focuses on the economic analysis and related documentation for supporting job creation estimates in individual EB-5 category immigrant investor petitions that are regional center-associated.

## 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.”<sup>6</sup> 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.<sup>7</sup> 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

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<sup>1</sup> Immigration and Nationality Act (INA) §§203(b)(5), 216A; 8 Code of Federal Regulations (CFR) §§204.6, 216.6; 6 *USCIS Policy Manual*, pt. G, ch. 2.D.

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

<sup>3</sup> *Id.* §610(c); 8 CFR §204.6(e); 6 *USCIS Policy Manual*, pt. G, ch. 2.D.5.

<sup>4</sup> The USCIS website has a complete listing of authorized EB-5 regional centers at [www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers](http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/immigrant-investor-regional-centers).

<sup>5</sup> State Department Annual Report on Immigrant Visas Issued and Adjustments of Status Subject to Numerical Limitations (Fiscal Year 2017), Table V (Part 3), <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport%20-TableV-PartIII.pdf>.

<sup>6</sup> 8 CFR §204.6(m)(7)(ii).

<sup>7</sup> See, e.g., RONALD E. MILLER AND PETER D. BLAIR, INPUT-OUTPUT ANALYSIS: FOUNDATIONS AND EXTENSIONS (2d ed. 2009); Wayne Miller, *Economic Multipliers: How Communities Can Use Them for Planning*, [www.uaex.edu/Other\\_Areas/publications/PDF/FSCED6.pdf](http://www.uaex.edu/Other_Areas/publications/PDF/FSCED6.pdf).

topic.<sup>8</sup> 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-associated 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-associated 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 interindustry 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-associated 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.

Two commonly used I-O models are the Regional Input-Output Modeling System (RIMS II),<sup>9</sup> which was created by the Bureau of Economic Analysis (BEA) in the Department of Commerce, and IMPLAN (IMPact analysis for PLANning), which is a commercial input-output model.<sup>10</sup> Both models find routine acceptance with USCIS.<sup>11</sup> RIMS II is a service of the BEA; one can purchase tables of multipliers for any single or multicounty adjacent region in the United States from the BEA, which publishes a handbook instructing on appropriate uses of RIMS II.<sup>12</sup> 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 multicounty 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

<sup>8</sup> See WASSILY LEONTIEF, *INPUT-OUTPUT ECONOMICS* (2d ed. 1986).

<sup>9</sup> <https://apps.bea.gov/regional/rims/rimsii/home.aspx>.

<sup>10</sup> IMPLAN is a product of the company of the same name, located in Huntsville, NC. IMPLAN grew out of impact analysis tools developed at the University of Minnesota to meet needs of the US Forest Service. Starting in 1988, it was used outside the federal government and in 1991 it was spun off as an independent company. See <http://implan.com/company/>.

<sup>11</sup> See USCIS EB-5 Training Materials (Apr. 20, 2015) 195, [www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies\\_and\\_Manuals/EB-5\\_Training\\_Materials.pdf](http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/EB-5_Training_Materials.pdf) (“Regional Centers typically use the REDYN, REMI, RIMS II or IMPLAN economic models to estimate the number of indirect jobs that will be created through investments in the regional center’s investment projects.”).

<sup>12</sup> Bureau of Economic Analysis, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System (RIMS II)* (3d ed. 1997), <http://bea.gov/scb/pdf/regional/perinc/meth/rims2.pdf> [hereinafter *RIMS II Handbook*].

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, REDYN<sup>13</sup> and REMI,<sup>14</sup> 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,<sup>15</sup> 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 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 demand<sup>16</sup> 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 BEA offers the tables of multipliers 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 either projected revenue or employment assumptions and can modify assumptions about labor compensation or local sourcing of inputs, and therefore a single multiplier might not suffice. A single-industry multiplier, such as RIMS II provides, cannot model such alterations of the supply relationship, but one can with IMPLAN. IMPLAN users should enter all appropriate input assumptions, let the model

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

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

<sup>15</sup> 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 [www.ofm.wa.gov/economy/io/2002/default.asp](http://www.ofm.wa.gov/economy/io/2002/default.asp).

<sup>16</sup> "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."

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 one to five 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, revenues, or expenditures of a business. Expenditure projections are a useful approach for modeling construction impacts and for situations where no historical industry data are included in the I-O model. For example, if an investor is bringing new technological process to commercial scale, there may not be any existing industry in the I-O model that resembles the new technology. But the analyst should be able to project input requirements and costs for the new technology, and these estimates, which rely on outputs of existing industries, can be used to estimate impacts. 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 of multiplier table.

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. An 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 indirect 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.<sup>18</sup> “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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

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<sup>18</sup> 6 *USCIS Policy Manual*, pt. G, ch. 2.D.4; see also USCIS EB-5 Training Materials, *supra* note 11, at 191.

<sup>19</sup> 8 CFR §204.6(e) (defining “employee”).

<sup>20</sup> USCIS acknowledged the occasional confusion with terminology at the EB-5 Immigrant Investor Program stakeholder meeting on December 16, 2010. See AILA Doc. No. 11010732 (PowerPoint slide 28). However, there is progress over time. The *Policy Manual* states: “Direct jobs are those jobs that establish an employer-employee relationship between the new commercial enterprise and the persons it employs. Indirect jobs are those that are held outside of the new commercial enterprise but are created as a result of the new commercial enterprise. For example, indirect jobs can include, but are not limited to, those held by employees of the job-creating entity (when the job-creating entity is not the new commercial enterprise) as well as employees of producers of materials, equipment, or services used by the new commercial enterprise or job-creating entity.” 6 *USCIS Policy Manual*, pt. G, ch. 2.D.4.

<sup>21</sup> 6 *USCIS Policy Manual*, pt. G, ch. 2.D.4 (“Due to the nature of accepted job creation modeling practices, USCIS relies upon reasonable economic models to determine that it is more likely than not that the indirect jobs are created. USCIS may request additional evidence that the indirect jobs created, or to be created, are full time. USCIS may also request additional evidence to verify that the direct jobs (those held at the new commercial enterprise) will be or are full-time and permanent, which may include a review of W-2 forms or similar evidence.”).

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.<sup>22</sup> 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, such as the intercounty commuting patterns of workers in multiple contiguous counties.<sup>23</sup> Thus, the inclusion of extraregional 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. 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 aircraft 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 a four-county Los Angeles metropolitan area are applied, the multiplier is 3.3933 (the “direct effect employment” multiplier for the aircraft manufacturing sector in the table below) and total job creation would be 339.3 jobs (which follows from 3.3933 x 100).

Table 1.5 Total Multipliers - detailed industries

Region: LA OR Riv S Bern (Type II)

Series: 2007 U.S. Benchmark I-O data and 2016 Regional Data

		Final-demand Output /1/ (dollars)	Final-demand Earnings /2/ (dollars)	Final-demand Employment /3/ (number of jobs)	Final-demand Value-added /4/ (dollars)	Direct-effect Earnings /5/ (dollars)	Direct-effect Employment /6/ (number of jobs)
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<sup>22</sup> See USCIS, Office of the Director, A. Mayorkas, Letter to Senator Patrick Leahy, Dec. 3, 2010, AILA Doc. No. 10122135, 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 on October 14, 2010. See AILA Doc. No. 10101537 (PowerPoint slides 34-38).

<sup>23</sup> 6 USCIS Policy Manual, pt. G, ch. 2.D.5 (“In reviewing whether an economic methodology is reasonable, USCIS analyzes whether the multipliers and assumptions about the geographic impact of the project are reasonable. For example, when reviewing the geographic level of the multipliers used in an input-output model, the following factors, among others, may be considered: •The area’s demographic structure (for example, labor pool supply, work force rate, population growth, and population density); •The area’s contribution to supply chains of the project; and •Connectivity with respect to socioeconomic variables in the area (for example, income level and purchasing power.”). See also similar USCIS comments at the EB-5 Immigrant Investor Program stakeholder meeting on October 14, 2010, AILA Doc. No. 10101537 (PowerPoint slide 28), and at the EB-5 Immigrant Investor Program stakeholder meeting on March 17, 2011, AILA Doc. No. 11010633.

336411	Aircraft manufactu ring	1.8607	0.4367	6.6651	0.9405	2.2367	3.3933
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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 upon stabilization. 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	\$19,999,993
Indirect Effect	32.7	\$2,145,655	\$3,223,744	\$6,196,363
Induced Effect	34.7	\$1,748,898	\$3,167,916	\$5,442,542
<b>Total Effect</b>	<b>230.1</b>	<b>\$10,876,801</b>	<b>\$19,112,406</b>	<b>\$31,638,911</b>

Source: IMPLAN model results screen

The above examples are straightforward, as they involve EB-5 investments for known uses and immediately ascertainable initial change data. However, several types of complications can arise in EB-5 cases in terms of identifying the initial change data that are used as input to the I-O model. First, when using RIMS II multipliers, the analyst must adjust, or “deflate,” the dollar values from the year that was used in the business plan to the regional data year used by RIMS. For construction costs this is done with the Producer Price Index; for operating revenues the Consumer Price Index (CPI) is used. With IMPLAN no price corrections are needed, as the model does these calculations internally. However, the event year must be set to the year when the expenditures will be made in order for the internal IMPLAN calculations to work.

The hotel example above is context for illustrating other possible complications with initial change data. The estimate of future revenues may require calculations and pro forma statements based on revenue-per-room or similar studies that are provided by hotel industry experts. USCIS may challenge the findings of these job creation analyses as not credible or self-serving without reference to such objective data providing independent validation of the assumptions and inputs,<sup>6</sup> or may doubt the proposed timeline for hotel stabilization as not

<sup>6</sup> 6 USCIS Policy Manual, pt. G, ch. 2.D.5 (“Additionally, if the regional center immigrant investor seeks to demonstrate job creation through the use of an economic input-output model, USCIS requires the investor to demonstrate that the methodology is reasonable. For example, if the inputs into the input-output model reflect jobs created directly at the new commercial enterprise or job-creating entity, USCIS requires the investor to demonstrate that the direct jobs input is reasonable. Relevant documentation may include Form I-9, tax or payroll records or if the jobs are not yet in existence, a comprehensive business plan demonstrating how many jobs will be created and when the jobs will be created.”)

fitting within the 2.5 year-construct USCIS imposes in adjudications of I-526 petitions.<sup>7</sup> Moreover, certain investments in hotel markets with obvious limited capacity may be suited to a job creation methodology that includes “guest expenditures” theory, which attempts to measure the job impacts flowing from added hotel capacity attracting new visitors to a market that had been constrained by limited capacity. This theory requires abundant local market data on occupancy rates reflecting unmet market demand and “new” visitor spending, as opposed to spending that is merely displaced from other hotels in the area. And, USCIS has not entirely shown its hand, allowing for significant uncertainty about USCIS adjudications.<sup>8</sup>

A job creation methodology that USCIS coined “tenant occupancy” methodology also points to potential problems with figuring initial change data. This methodology was successfully used in the past where the EB-5 capital was used to build out space and the EB-5 investors desired to claim job creation credit for the future tenants of the building. Developers would 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. Square-feet-per-job estimates from planners, or the surveys done by the Energy Information Administration (EIA), have proven useful.<sup>9</sup> 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 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. While USCIS allowed applicants and petitioners to avoid having to establish an equity or direct financial connection between the EB-5 capital investment and the employees of prospective tenants, USCIS policy required market studies that show that prospective tenants, due to the lack

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If the inputs into the model reflect expenditures, USCIS requires the investor to demonstrate that the expenditures input is reasonable. Relevant documentation may include receipts and other financial records for expenditures that have occurred and a detailed projection of sales, costs, and income projections such as a pro-forma cash flow statement associated with the business plan for expenditures that will occur.

If the inputs into the model reflect revenues, USCIS requires the investor to demonstrate that the revenues input is reasonable. Relevant documentation may include tax or other financial records for revenues that have occurred or a detailed projection of sales, costs, and income projections such as a pro-forma income statement associated with the business plan for revenues that will occur.”).

<sup>7</sup> See *id.* (“The 2-year period is deemed to begin 6 months after adjudication of Form I-526. The business plan filed with the immigrant petition should reasonably demonstrate that the requisite number of jobs will be created by the end of this 2-year period.”). See also Catherine De Bono Holmes, *The Rationale for Using Stabilized Hotel Revenues to Determine Jobs Created by Hotel Projects Using EB-5 Financing*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 375 (3d ed. 2014); H. Ronald Klasko, *Critical Perspectives and Practical Advice Regarding EB-5 Job Creation Timelines*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 369 (3d ed. 2014).

<sup>8</sup> See, e.g., Paul Sommers, *Including Guest Expenditure Impacts in Analyses of Job Creation in EB-5 Hotel Investments*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS (3d ed. 2014). See also Lincoln Stone, *Economics of EB-5 Job Creation: Overcoming “Tenant Occupancy” and “Guest Expenditures Objections*, IMMIGRATION DAILY (Dec. 10, 2013), available at <http://discuss.ilw.com/articles/articles/382207-article-the-economics-of-eb-5-job-creation-overcoming-tenant-occupancy-and-guest-expenditures-objections-by-lincoln-stone>.

<sup>9</sup> [www.eia.doe.gov/emeu/cbecs/cbecs2003/detailed\\_tables\\_2003/detailed\\_tables\\_2003.html](http://www.eia.doe.gov/emeu/cbecs/cbecs2003/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., Stephen S. Fuller, *How to Calculate the Economic Contribution of Office, Industrial and Retail Real Estate to the Local Community* (Feb. 2005), available at [www.naiop.org/Research/Our-Research/Reports/How-to-Calculate-the-Economic-Contribution](http://www.naiop.org/Research/Our-Research/Reports/How-to-Calculate-the-Economic-Contribution).



of a specific kind of building space, are unable to expand; 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.<sup>10</sup> It would seem 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.<sup>11</sup> But effective May 15, 2018, USCIS rescinded its earlier policy indicating it would no longer accept this methodology, stating:

Reliance on a showing of constraint on supply or excess of demand by itself does not establish a causal link between specific space and a net new labor demand such that it would overcome the lack of a sufficient nexus.

Moreover, allowing applicants and petitioners to use prospective tenant jobs as direct inputs into regional growth models to generate the number of indirect and induced jobs that result from the credited tenant jobs leads to a more attenuated and less verifiable connection to the investment. There is also no reasonable test to confirm that jobs claimed through either tenant-occupancy methodology are new rather than relocated jobs such that they should qualify as direct inputs in the first place.

In sum, tenant-occupancy methodologies described in the 2012 Operational Guidance and previously incorporated into the Policy Manual result in a connection or nexus between the investment and jobs that is too tenuous and thus are no longer considered reasonable methodologies or valid forecasting tools under the regulations.<sup>12</sup>

Yet another set of controversies erupted where certain regional center groups had been approved for regional center designation based on a job creation methodology pegged to the dollars invested in the NCE as the initial change data for estimating operations-phase jobs. In these cases, typically, the industry focus of the EB-5 investment may be known, but the specific “job-creating enterprise” (JCE)<sup>26</sup> is not known. For example, USCIS had approved 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. In another example, USCIS had accepted industry data on the estimated job creation impact of an infusion of capital – as with the proceeds of an SBA loan – for a particular type of business. But both of these examples reveal that USCIS thinking evolved over time, as indicated in denials of individual investor I-526 petitions, so as to discourage the use of the job creation methodology. With the USCIS emphasis on knowing the specific identity of JCEs that would receive EB-5 capital, these forms of job creation methodologies do not appear to be in favor at USCIS.

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. While USCIS has designated regional centers that previously used a job creation methodology built from “homegrown” multipliers grounded in local or regional demographics and economic indicators, over time USCIS did not consider it bound to earlier approvals and used adjudications of individual investor I-526 petitions to dissuade such regional centers from using these multipliers for estimating job creation.

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<sup>10</sup> USCIS Statement on EB-5 Tenant Occupancy Methodology (Feb. 17, 2012), AILA Doc. No. 12022160.

<sup>11</sup> See John Barrett, *Building Successful Economic Arguments to Gain Credit for Tenant Jobs*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 391 (3d ed. 2014). See also Lincoln Stone, *FOIA Reveals USCIS Adjudications and Behind-the-Curtain Work on “Tenant Occupancy” Job Creation*, IIUSA REGIONAL CENTER BUSINESS JOURNAL (Winter 2013).

<sup>12</sup> 6 USCIS Policy Manual, pt. G, ch. 2.D.6.

<sup>26</sup> USCIS distinguishes between the “new commercial enterprise” (NCE), which is legal terminology grounded in statute and regulations, and the “job-creating enterprise” (JCE), which is intended to signify the employer entity. See EB-5 Immigrant Investor Program Stakeholder Meeting, Mar. 17, 2011, AILA Doc. No. 11010633 (PowerPoint slide 53, et seq.).

### ESTIMATING CONSTRUCTION-PHASE JOBS

The analyst estimates construction-phase jobs by using as the input data to the I-O model the total dollars expended on construction. Note there may be slightly different multipliers for hard construction costs and soft costs, and the analysis must describe these differences. Thus, assuming use of RIMS II with 2016 regional data, the total construction-phase job creation is easily calculated by using 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 2016 dollars) on hotel construction in Los Angeles County. The outcome would be 434 total construction-phase jobs. The calculation is  $30 \times 14.4899$  because final demand in the construction industry changed by \$30 million, so the final demand/employment multiplier for nonresidential structures is used.

Table 1.5 Total Multipliers - detailed industries

Region: LA OR Riv S Bern (Type II)

Series: 2007 U.S. Benchmark I-O data and 2016 Regional Data

		Final- demand Output /1/ (dollars)	Final- demand Earnings /2/ (dollars)	Final- demand Employment /3/ (number of jobs)	Final- demand Value- added /4/ (dollars)	Direct- effect Earnings /5/ (dollars)	Direct- effect Employment /6/ (number of jobs)
2332C0	Nonresidenti al structures	2.1463	0.7916	14.4899	1.235	1.672	1.9312

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 derived from a 2007 base model and 2016 regional data. Scrutiny of footnotes and other documents shows that 2007 refers to the year the survey data in the model were collected, and that all dollar values in this multiplier table are stated in 2016 dollars. Thus any dollar values used in the analysis must be converted from the current year to 2016 values, using an index such as the Consumer Price Index or the Producer Price Index.<sup>27</sup> For construction expenditures, the Producer Price Index is more appropriate.

As it has become common for EB-5 capital to be just one source in a larger capital stack to fund a specific project, analysts also should factor in any domestic-source capital such as developer funding or bank financing when 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,<sup>28</sup> 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

<sup>27</sup> For information about these indexes, see [www.bls.gov/bls/proghome.htm](http://www.bls.gov/bls/proghome.htm).

<sup>28</sup> 8 CFR §204.6(g)(2); see also 6 USCIS Policy Manual, pt. G, ch. 2.D.

would be double, or 868 jobs. Proponents of this approach, however, should anticipate further USCIS scrutiny and demands for specific documentation of the other-source capital.

The job creation analysis should not automatically assume that all capital used in a development 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 and to purchase equipment, and otherwise used to support company operations, may be considered as job creating, but individual line items might not be appropriate as initial change data to be plugged into a construction multiplier.

A related issue arises where the EB-5 capital becomes available 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. 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.<sup>29</sup> USCIS 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.<sup>30</sup>

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.<sup>31</sup> In the case of construction of shorter duration, USCIS says that only the indirect (including induced) construction-phase jobs can be claimed.<sup>32</sup>

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.

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<sup>29</sup> On the issue of “bridge financing” the *Policy Manual* acknowledges EB-5 capital used to replace “short-term temporary financing” may be credited with job creation that pre-dates the EB-5 investment. Also see USCIS’s comments on questions raised at the EB-5 Immigrant Investor Program stakeholder meeting on June 30, 2011, AILA Doc. No. 11050462, and USCIS Memorandum, A. Mayorikas, “A Work in Progress: Towards a New Draft Policy Memorandum Guiding EB-5 Adjudications” (Nov. 9, 2011) 12, AILA Doc. No. 11110938.

<sup>30</sup> The Administrative Appeals Office (AAO) 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. *Matter of Regional Center of Victorville Development Inc.*, RCW 103 1910251 (AAO Dec. 21, 2011), AILA Doc. No. 12021367.

<sup>31</sup> See USCIS Memorandum, D. Neufeld, “EB-5 Alien Entrepreneurs—Job Creation and Full-Time Positions” (June 17, 2009) 5, AILA Doc. No. 09061964.

<sup>32</sup> 6 *USCIS Policy Manual*, pt. G, ch. 5.B (“Direct jobs that are intermittent, temporary, seasonal, or transient in nature do not qualify as permanent full-time jobs. However, jobs that are expected to last for at least 2 years generally are not considered intermittent, temporary, seasonal, or transient in nature.”); see also USCIS, Office of Congressional Relations, J. McCament, Letter to Sen. John Cornyn, Jan. 16, 2009, AILA Doc. No. 09011680.

Summary Results   Detail Results   Tax Impact					
Total Impact Summary   Copy   Export					
	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
	<b>Total Effect</b>	<b>709.8</b>	<b>\$36,468,871</b>	<b>\$46,993,656</b>	<b>\$112,739,557</b>

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.

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.

### THE ECONOMIST'S REPORT

The statute requires that indirect job creation be documented by “reasonable methodologies,”<sup>13</sup> but omits specifics. The 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,<sup>35</sup> but a later statutory revision modified if not eliminated this linkage to export sales as a necessary item of proof.<sup>36</sup> The regulations provide that job creation methodologies may consist of multiplier tables, feasibility studies, and other economically or statistically valid forecasting devices.<sup>37</sup> 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.<sup>38</sup> If nothing else, the 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 some rather simple

<sup>13</sup> Pub. L. No. 102-395, Title VI, §610(c), 106 Stat. 1874, 8 USC §1153 note.

<sup>35</sup> 8 CFR §204.6(j)(4)(iii).

<sup>36</sup> Pub. L. No. 106-396, Title IV, §402, 114 Stat. 1637, 1647.

<sup>37</sup> 8 CFR §204.6(m)(7)(ii).

<sup>38</sup> 6 *USCIS Policy Manual*, pt. G, ch. 5.A. Also see the PowerPoint presentation from the EB-5 Immigrant Investor Program stakeholder meeting on June 30, 2011, AILA Doc. No. 11050462, and the accompanying comments of the USCIS economist.

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.<sup>39</sup> 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.<sup>40</sup> 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 codes<sup>41</sup> for all industry sectors, and, if possible, the sector codes from the I-O model used to project indirect impacts. USCIS aims 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 ASSOCIATION

Each I-526 petition based on investment in a regional center–associated NCE must be linked in some way to the regional center and its designation previously granted by USCIS (or the 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 the INS first approved regional centers, each regional center designation is represented in an approval letter (or letters) issued by the 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 process, 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. In the new era

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<sup>39</sup> 8 CFR §204.6(j)(4).

<sup>40</sup> See 6 USCIS Policy Manual, pt. G, ch. 2.D.5 (“The 2-year period is deemed to begin 6 months after adjudication of Form I-526. The business plan filed with the immigrant petition should reasonably demonstrate that the requisite number of jobs will be created by the end of this 2-year period.”). Note there is an argument that a regional center–associated investor is not subject to the same time parameters for job creation. The regulation at 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.

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

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.<sup>42</sup>

In order to demonstrate the regional center connection, the I-526 petition should be supported by copies of:

- The regional center approval letter;<sup>14</sup>
- 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 based upon our experience over time with I-924 approval letters, and recent requests for evidence instructing individual I-526 petitioners to provide copies of documents that were included with I-924 filings based on investment in the same NCE.<sup>43</sup>

### SPECIAL CONSIDERATIONS FOR 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.<sup>48</sup> The statute concerning removal of conditions does not even mention proof of job creation as a requirement for removal of conditions.<sup>49</sup> The statutory concern is with “sustaining” the commercial enterprise,<sup>50</sup> 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.<sup>51</sup> Nonetheless, the regulations for removal of conditions impose on the investor the obligation to prove that jobs have been created or will be created within a reasonable time.<sup>52</sup>

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<sup>42</sup> See Form I-924 and instructions; see also Lincoln Stone, *Regional Center Designation: Refining the Basic Approval*, IIUSA REGIONAL CENTER BUSINESS JOURNAL (Mar. 2015); Lincoln Stone, *Trends in Approvals of Regional Centers in the EB-5 Investor Visa Program*, 18 BENDER’S IMMIGR. BULL. 3 (Jan. 1, 2013).

<sup>14</sup> 6 USCIS Policy Manual, pt. G. ch.2.A.

<sup>43</sup> Note too that regional center approval letters historically stated 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.

<sup>48</sup> See, e.g., Lincoln Stone, *Conditional Permanent Residence and Immigration Risk for Investors*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 165 (2d ed. 2010); Lincoln Stone, *The Certainty of Change and Risk in Investment Immigration*, IMMIGRATION DAILY (Sept. 21, 2010), available at [www.ilw.com/articles/2010,0921-stone.shtm](http://www.ilw.com/articles/2010,0921-stone.shtm).

<sup>49</sup> INA §216A(d)(1).

<sup>50</sup> 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).

<sup>51</sup> 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 stated that the primary purpose of the I-829 adjudication is to determine that 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) 5, AILA Doc. No. 09061964.

<sup>52</sup> 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 Regional Center 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

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 overly optimistic 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.<sup>53</sup>

Note, however, that where a new job creation methodology is used at the I-829 petition stage, the I-829 petition will not enjoy the benefits of USCIS's deference policy in the adjudication process. Where USCIS approved, for example, the economic report and job creation methodology at the I-526 petition stage, it generally defers to that prior favorable decision at the I-829 petition stage.<sup>15</sup> Thus, where the same job-creation methodology is used throughout the immigration process, job-creation-related inquiries from USCIS at the I-829 petition stage are generally limited to requests for evidence to support the validity of inputs to the I-O model.

Job creation methodologies submitted with I-526 petitions typically use a construction budget based on estimated expenditures as an input to the I-O model to forecast the number of jobs that will be created in the construction phase, and in some cases projected revenues or an estimate of onsite jobs are also used to forecast operations-phase job creation. The I-829 petition therefore must establish by a preponderance of the evidence that actual construction-related expenditures, and possibly revenues or onsite jobs, are sufficient to support the level of job creation required for approval of the I-829 petition. Documentation typically consists of construction draw requests, general ledgers, invoices and receipts, bank statements, and tax returns.

Of importance to planning for the I-829 petition is that USCIS has devised an adjudication approach whereby cases involving new direct (onsite) jobs as an input to the I-O model 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.<sup>16</sup> The absence of proof concerning citizenship or residence status for direct workers could undermine the applicability of the entire methodology for crediting indirect employment.<sup>17</sup> Historically, USCIS 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 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 usually content to have documentation of "performed activities" as sufficient proof to support a reasonable methodology. For example, rather than supplying 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. The regulations for removal of

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creation regulation does not apply to I-829 petitions based on regional center investment. See Lincoln Stone, *Conditional Permanent Residence and Immigration Risk for Investors*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 165, 189 (2d ed. 2010).

<sup>53</sup> 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 nonprecedent decision, *Matter of [name not provided]*, [file number not provided] 15 (AAO Apr. 14, 2011), AILA Doc. No. 11041480 (basing its reasoning on *Chang v. U.S.*, 327 F.3d 911 (9th Cir. 2003)).

<sup>15</sup> 6 *USCIS Policy Manual*, pt. G, ch. 6.

<sup>16</sup> USCIS Invitation and Presentation to Quarterly EB-5 Stakeholder Engagements in FY2011 (Updated 3/17/11), AILA Doc. No. 11010633.

<sup>17</sup> See *Matter of [name not provided]*, [file number not provided] 14–17 (AAO Apr. 14, 2011), AILA Doc. No. 11041480.

conditions, while imposing the requirement of job creation, also contemplate future job creation “within a reasonable time.”<sup>18</sup> 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. Earlier in the EB-5 program, USCIS instructed examiners to exercise discretion in determining what is a reasonable time, and in appropriate cases to approve removal of conditions based on expected future job creation.<sup>19</sup> 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.

The *USCIS Policy Manual*, however, sets a specific timeframe in order for job creation to be deemed “within a reasonable time.”

Jobs projected to be created more than 3 years after the immigrant investor’s admission in, or adjustment to, conditional permanent resident status usually will not be considered to be created within a reasonable time unless extreme circumstances [fn: For example, force majeure] are presented.<sup>20</sup>

As of this writing, the authors are unaware of legal challenges to the policy.

### CONCLUSION

The role of the economist in regional center–associated 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-associated investment cases are absolutely essential tools for the effective representation of EB-5 immigrant investor clients.

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<sup>18</sup> 8 CFR §216.6(a)(4)(iv).

<sup>19</sup> USCIS Memorandum, D. Neufeld, “EB-5 Alien Entrepreneurs—Job Creation and Full-Time Positions” (June 17, 2009) 6–7, AILA Doc. No. 09061964.

<sup>20</sup> 6 *USCIS Policy Manual*, pt. G, ch. 5.B.2.