

## I-829 EB-5 Petitions: Evidence of Job Creation in the Regional Center Context

By Kristal Ozmun and Stephen Yale-Loehr\*

### Introduction

Congress created the fifth employment-based preference (EB-5) immigrant visa category in 1990 for immigrants seeking to enter the United States to engage in a commercial enterprise that will benefit the U.S. economy and create or save at least 10 full-time jobs per investor.<sup>1</sup> To encourage immigration through the EB-5 category, Congress created a pilot program in 1993.<sup>2</sup> The Immigrant Investor Pilot Program (“pilot program”) directs the Attorney General and Secretary of State to set aside 3,000 visas each year for people who invest in designated regional centers. An advantage of investing through a regional center is that direct, indirect and induced jobs can all be counted.<sup>3</sup> By contrast, a foreign national investing outside a regional center can only count direct jobs for EB-5 purposes.<sup>4</sup>

Procedurally, an EB-5 investor starts the process by filing Form I-526 Immigrant Petition by Alien Entrepreneur (“I-526 petition”) with the U.S. Citizenship and Immigration Services (“USCIS”). The petition must include a business plan showing how the necessary jobs will be created with the next two years.<sup>5</sup> After the I-526 petition is approved, the investor goes through consular processing or adjustment of status.<sup>6</sup> If approved, the investor receives a conditional green card valid for two years. At the end of the two-year period of conditional residency the investor files

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<sup>1</sup> INA § 203(b)(5), 8 U.S.C. § 1153(b)(5). For a detailed treatment of the EB-5 immigrant investor category, see 3 Charles Gordon, Stanley Mailman, & Stephen Yale-Loehr, *Immigration Law and Procedure* § 39.07 (rev. ed. 2010).

<sup>2</sup> Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 610, 106 Stat. 1828; S. Rep. No. 102-918 (1992).

<sup>3</sup> 8 C.F.R. § 204.6(m)(7)(ii).

<sup>4</sup> 8 C.F.R. § 204.6(j)(4).

<sup>5</sup> Matter of Ho, 22 I. & N. Dec. 206, 19 Immigr. Rep. B2-99 (INS Assoc. Comm’r, Examinations 1998).

<sup>6</sup> 8 C.F.R. § 204.6(l).

Form I-829 Petition by Entrepreneur to Remove Conditions (“I-829 petition”).<sup>7</sup> That petition must show that the requisite number of jobs were created or will be created within a reasonable period of time as a result of the individual’s qualifying investment.<sup>8</sup> Providing that proof can be difficult because of the differing evidentiary requirements set forth by USCIS and the amorphous nature of the reasonable time language.

This article explores the evidentiary requirements for proving EB-5 job creation at the I-829 stage, while also presenting the impact of recent USCIS guidance on the reasonable time component in the EB-5 regional center context.

## **EB-5 Economics**

Economic reports submitted with regional center applications and subsequent I-526 and I-829 petitions must demonstrate direct and indirect job creation by use of “reasonable methodologies.”<sup>9</sup> USCIS has accepted input/output models as “reasonable methodologies” to estimate the job creation potential of given projects within a regional center. Examples of USCIS-approved input/output models include Regional Economic Models, Inc. (REMI),<sup>10</sup> Regional Input-Output Modeling System (RIMS II),<sup>11</sup> Impact Analysis for Planning (IMPLAN),<sup>12</sup> and Regional Dynamics Economic Analysis Model (REDYN).<sup>13</sup>

Input/output modeling is a means of examining relationships within an economy, both between businesses and between businesses and final consumers. It determines what quantity of a given input is needed to produce a unit of output in another industry.<sup>14</sup> Input/output models use national data updated annually from agencies such as the Bureau of Labor Statistics, Bureau of Economic Analysis, and the U.S. Census Bureau. That data is also benchmarked to economic censuses like the Census of Retail Trade once every five years. This data is used to create multipliers that form the basis of input/output analysis. Multipliers are applied to given inputs within the model to determine the resultant job creation. Regional multipliers are used to ascertain what percentage of those new jobs are created within the defined regional center geographic area.

The data initially inputted into an input/output model to determine job creation is not limited to one specific form. The number of direct jobs or the change in final demand (revenues) of a given project are examples of appropriate input data. In theory, both sets of input data should produce the same economic impact and job creation results, but the starting point is different for each. USCIS appears to have interpreted the use of different data inputs as two separate economic models: the “direct effects model” and the “expenditure model.” Sufficient evidence of job

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<sup>7</sup> 8 C.F.R. § 216.6(a).

<sup>8</sup> 8 C.F.R. § 216.6(a)(4)(iv).

<sup>9</sup> 8 C.F.R. § 204.6(j)(4)(iii).

<sup>10</sup> See generally <http://www.remi.com>.

<sup>11</sup> See generally <https://www.bea.gov/regional/rims>.

<sup>12</sup> See generally <http://implan.com>.

<sup>13</sup> See generally <http://www.regionaldynamics.com>.

<sup>14</sup> See generally <https://www.bea.gov/regional/rims>.

creation at the I-829 stage differs, depending upon which model was used at the time of filing the I-526 petition.

### **Direct Effects v. Expenditure: Evidentiary Requirements**

When using the direct effects model, an EB-5 economist first estimates the number of direct jobs that will be created by a given project. This may be done a variety of ways, including relying on job hiring estimates supplied by the project developer or by calculating direct jobs based on the square footage of the establishment. A multiplier is then applied to that number within the model to determine the resulting indirect and induced job creation.

If an EB-5 investor's I-829 petition is based upon an approved I-526 petition that used the direct effects model, the investor must present evidence of the number of new direct full time employees whose positions were created as a result of his or her investment. USCIS and the relevant regulations explicitly state that such evidence includes quarterly state employment tax reports, Forms W-2, Forms I-9, and other pertinent employment records sufficient to demonstrate the number and full time nature of the new direct jobs.<sup>15</sup> USCIS does not require additional evidence to demonstrate the existence of the indirect and induced jobs.

Use of the expenditure model requires knowledge of the amount of capital that will be invested or loaned to, and subsequently spent by, the project. The amount is not restricted to EB-5 capital but may include other sources that will be invested roughly at the same time and for the same purpose. The EB-5 economist may use this amount and/or other data to generate an estimate of the revenues, or change in final demand, of a given product or service within the regional center geographic area. The change in final demand is entered into the model to produce the number of jobs created by the project (direct, indirect, and induced).<sup>16</sup>

The regulations do not differentiate between the two models. However, USCIS has indicated that if the expenditure model is used at the I-526 stage, it "must make sure that the full amount has, in fact, been invested in the job creating enterprise to support the job count."<sup>17</sup> USCIS has not articulated what constitutes evidence of expenditures, but it is presumed that it would take the form of receipts, invoices, bills of sale, etc.

USCIS has never explicitly stated that it would *not* require evidence of direct job creation in addition to the evidence of amounts spent. Rather it is inferred from USCIS' failure to specify the exact standard of proof for the expenditure model, as it has for the direct jobs model. This inference gains some support from recent USCIS guidance. Indeed, USCIS, in the context of

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<sup>15</sup> 8 C.F.R. § 216.6(a)(4)(iv).

<sup>16</sup> See generally Bureau of Economic Analysis, U.S. Dep't of Labor, RIMS II Multipliers, <https://www.bea.gov/regional/rims/rimsii/help.aspx#RIMSIIMultipliers>.

<sup>17</sup> Memorandum from Michael Aytes, Acting USCIS Deputy Director, to Richard Flowers, Acting USCIS Ombudsman, *Response to Recommendation 40, Employment Creation Immigrant Visa (EB-5) Program Recommendations 2* (June 12, 2009), [http://www.uscis.gov/files/nativedocuments/recc40\\_12jun09.pdf](http://www.uscis.gov/files/nativedocuments/recc40_12jun09.pdf).

discussing job creation estimates at the I-526 stage, has stated that “the I-526 petition should demonstrate that the required infusion of capital *or* the creation of the direct jobs will occur within two years.”<sup>18</sup> Use of the disjunctive indicates that only one form of evidence is required. While this analysis pertains to the I-526 filing, it is reasonable to assume that the same standard of proof would apply at the I-829 stage. In addition, recent requests for evidence by USCIS have indicated that clearly distinguishing between use of the expenditure model and the direct effects model will be critical at the I-829 stage, which further supports the assumption that the evidentiary requirements are distinct for each model. Here is some sample language:

“When relying on econometric models for indirect job creation it is imperative that direct jobs will be real identifiable jobs supported by wage reports or I-9 forms[;] otherwise they must be explicitly identified as hypothetical in nature. Another method would be to predict jobs based on dollar amount invested in the overall project and this too must be made clear. This distinction will be critical at the I-829 removal of condition stage of the immigration process.”<sup>19</sup>

### **Reasonable Time**

According to the regulations, an I-829 petition that demonstrates that an investment will create the requisite number of jobs within a *reasonable time*, and that otherwise satisfies the regulatory requirements, should be approved.<sup>20</sup> In making the reasonable time determination, adjudicators are supposed to “consider the evidence submitted along with the petition that demonstrates when the jobs are expected to be created, the reasons that the jobs were not created as predicted in Form I-526, the nature of the industry or industries in which the jobs are to be created, and any other evidence submitted by the petitioner.”<sup>21</sup> If the adjudicator finds that it is more likely than not that the jobs will be in place within a reasonable time, the I-829 petition should be approved; otherwise the petition must be denied.<sup>22</sup>

The regulations do not define “reasonable time.” In cases relying on the reasonable time language, some attorneys have had success by submitting a new business plan and economic report with the I-829 petition showing that the jobs will be created within six months. Nonetheless, there is no guarantee that USCIS will continue to accept such evidence as proof of job creation within a reasonable time in the future.

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<sup>18</sup> Memorandum from Donald Neufeld, Acting USCIS Associate Director for Domestic Operations, to USCIS Field Leadership, File No. HQ 70/6.1.8, AD 09-04, *EB-5 Alien Entrepreneurs – Job Creation and Full-Time Positions (AFM Update AD 09-04)*, at 5 (June 17, 2009) (emphasis added), [http://www.uscis.gov/files/nativedocuments/eb5\\_17jun09.pdf](http://www.uscis.gov/files/nativedocuments/eb5_17jun09.pdf) [hereinafter Neufeld June 17 Memorandum].

<sup>19</sup> Matter of [name not provided], File no. [not provided] (Dec. 9, 2009) (application for regional center designation in California) (copy on file with authors).

<sup>20</sup> 8 C.F.R. § 216.6(a)(4)(iv).

<sup>21</sup> Neufeld June 17 Memorandum, *supra* note 18, at 6.

<sup>22</sup> *Id.* at 7.

The reasonable time reprieve, if granted, allows EB-5 petitioners an additional period of time within which to create the required number of jobs. It does not, however, provide them with additional time for I-829 adjudication. USCIS is supposed to decide I-829 petitions within ninety days.<sup>23</sup> If the investor cannot show job creation or job creation within a reasonable time at the point of I-829 petition adjudication, no extension is possible; the petition is simply denied.<sup>24</sup>

While the reasonable time language appears to grant petitioners some flexibility in terms of the timing of job creation, tension exists between this regulation and recent USCIS guidance set forth in a December 11, 2009 memorandum.<sup>25</sup> The memorandum indicates that the business plan submitted with an I-526 petition may not be materially changed after the petition has been filed, as it serves as the basis for assessing whether the requisite capital investment has been sustained during the period of conditional residency and whether the required number of jobs have been created or will be created within a reasonable period of time.<sup>26</sup> Material changes to the business plan require an investor to submit a new I-526 petition, thus further delaying a grant of conditional residency.<sup>27</sup>

Although the memorandum does not define material change, it states: “[t]his may occur when the job creating capital investment project or commercial enterprise that was relied upon for the approval of the Form I-526 petition fails, or otherwise cannot be completed, within the alien’s two-year period of conditional residence.”<sup>28</sup> This would seem to imply that investors should not feel comfortable claiming job creation within a reasonable time after the standard two-year period, as project delays may be deemed material and require submission of a new I-526 petition. USCIS has yet to issue any further guidance on this topic, but it seems safe to assume that the imposition of the material change standard may curtail an investor’s ability to rely on the reasonable time provision at the I-829 petition stage.

## Conclusion

The evidentiary requirements for job creation at the I-829 stage appear to differ depending on the type of economic model used for the I-526 petition filing and whether the jobs were actually created as predicted in that model. If using the direct effects model, evidence should be in the form of I-9’s, W-2’s, and employment tax reports. If using the expenditure model, invoices, bills, or receipts showing proof of all project expenditures may suffice. If jobs are not yet created as

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<sup>23</sup> 8 C.F.R. § 216.6(c)(1).

<sup>24</sup> See Neufeld June 17 Memorandum, *supra* note 18, at 7.

<sup>25</sup> Memorandum from Donald Neufeld, Acting USCIS Associate Director for Domestic Operations, to USCIS Field Leadership, File No. HQ 70/6.2, AD 09-38, *Adjudication of EB-5 Regional Center Proposals and Affiliated Form I-526 and Form I-829 Petitions; Adjudicators Field Manual (AFM) Update to Chapters 22.4 and 25.2 (AD09-38)*, at 19 (Dec. 11, 2009), [http://www.uscis.gov/USCIS/Laws/Memoranda/Static%20Files%20Memoranda/Adjudicating%20of%20EB-5\\_121109.pdf](http://www.uscis.gov/USCIS/Laws/Memoranda/Static%20Files%20Memoranda/Adjudicating%20of%20EB-5_121109.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 20.

<sup>28</sup> *Id.* at 19.

required at the I-829 stage, an investor may submit evidence of impending job creation within a reasonable period of time. However, an EB-5 investor should be wary of relying on this provision, as it is possible that USCIS may deem a project delay, and thus job creation delay, to be a material change requiring submission of a new I-526 petition.

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