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"Best Practices" for Estimating Construction Activity Jobs under the EB-5 Regional Center Program—What Immigration Lawyers Should Know

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Note: This article appeared in the Fall 2017 Publication by NES Financial where leading EB-5 professionals shared their expertise on key issues of concern related to filing requirements of EB-5 investor petitioners. Mr. Carr describes what immigration counsel should be looking when examining an economic impact study for compliance with EB-5 program standards for such studies.

Many EB-5 practitioners remember that it was not all that long ago when job creation generated by the construction activities of a development project could not be counted towards the "10 jobs per investor" requirement under the EB-5 Immigrant Investor Program. Today, many EB-5 projects in the marketplace rely heavily on jobs created by construction activity to raise EB-5 capital. In fact, it is now very common for projects to rely exclusively on jobs created by construction activity, with many of the industry's largest projects adopting this route as the path of least resistance to obtaining EB-5 capital. Hotels and "Mixed Use" development projects remain as two of the most popular types of projects used by EB-5 Projects, and virtually all of these projects use construction as the major job generator providing support for the EB-5 capital portion of the total capital stack. Correctly estimating jobs created by construction activity has become a must for successful EB-5 offerings and for properly counting the jobs created by an important U.S. economic development program.

Timing and Timelines Do Matter

Under current EB-5 rules,[1] both direct and indirect jobs (at least as an economist sees them[2]) created by construction activities may be used as EB-5 Program-eligible jobs if the construction project lasts for at least two (2) years (or for 24 continuous months). If a construction project is not expected to last for at least two years, then only the economically indirect jobs (which also includes a sub-set of income-based "induced" jobs) can be counted towards the 10 jobs per investor math requirement. For most EB-5 projects, the two year period typically begins when the project "breaks ground." If there is a significant amount of demolition involved in a project, many times a project can likely effectively argue that "construction" actually began at the start of demolition. A conservative approach used by some projects (particularly for larger projects) is to

[1] By E-5 Program "rules," the author means existing USCIS guidelines as presented in stakeholder engagements, USCIS guidance notes and memoranda (both those issued as final and others which are still "draft"), and issues raised in the USCIS' case RFEs, AAO decisions, and well-known and acknowledged case law—present EB-5 reform discussions notwithstanding.

[2] Experienced EB-5 program participants understand that the economic definition of a direct job and an indirect job is different than the immigration law definition. To an economist, direct jobs are defined as those that are created as a direct result of the incremental change in final demand for a given project (e.g., the developer hires a construction management firm and associated construction contractors). Indirect jobs are created as materials and other inputs to production are supplied to the project (e.g., the supplier of steel to the construction firm hires additional staff). It should be noted that induced jobs, which are a subset of indirect jobs, are created when the new workers occupying the direct and indirect jobs spend their new income earned in their employment related to the project at other businesses in the economy (e.g., consumer-oriented goods and services).

apply the two year requirement to each construction activity area (as defined by the North American Industry Classification System activity or "NAICS" activity category), even though the USCIS has indicated this is not necessary. Under that approach, economically direct and economically indirect jobs are counted-aggregated only by how each separate NAICS category conforms to the two year requirement. However, this is often viewed as too conservative an approach for some projects. Most projects use a holistic approach to the construction project's overall timeline, counting jobs using the period defined from ground-breaking to the completion of the final finishing work for a project in its entirety.

In addition to the above, a developer of a construction project under the EB-5 Program also has to be concerned about the actual timing of job creation. At the I-526 petition filing stage, the USCIS requires that all jobs be created within two years and six months of the adjudication of the investor's I-526 petition.[3] Known as the so-called 2½ year rule, this has significant implications for a construction project's EB-5 timeline. If the development project is a substantial one, covering multiple years of significant amounts of construction activity, it may be useful to consider phasing the larger development project and presenting the project's information to the USCIS as multiple EB-5 projects and offerings. The typical maximum length of a construction project under the EB-5 program is 4 years—considering typical adjudication times are now over 14 months and it usually takes at least 6 months to solicit and secure any significant number of EB-5 investors. If a project wants to include any amount of operations activity-based jobs, it is almost a necessity that construction activity not last for longer than 3 years. It usually takes about a year for operations in any project to gear up in a significant enough way to make it worth the effort to develop the supporting materials needed to adequately support an EB-5 program job benefits request for operations jobs.

Estimating Jobs from Construction Activity

Jobs that are created by construction activity are estimated by applying the final demand multiplier through the selected input-output tool,[4] properly adjusted for inflation (discussed in detail below), to construction expenditures—which are typically defined as the "change in final demand." The final demand multiplier or multipliers directly applied or applied through the use of an economic impact model tool essentially produces an estimate of the number of jobs created per increment of change in final demand. For most projects, the implied aggregate multiplier for associated construction activity is between 10 and 15 jobs per $1.0 million in expenditures—depending on the type of construction activity, the mix of horizontal and vertical construction, the type of structure or structures built, and the geographic area where the project is located. This comes from more than 35 years of doing this type of work where we have found that the same construction draw schedule for a project location in Los Angeles versus New York, Chicago or Miami will produce different job impact results.

Care should be exercised in organizing a development budget to include or exclude parts of the construction expenditure plan or budget, the specification of final demand to be applied to the input-output tool, the method of counting jobs used, and how they are presented to the USCIS case officer. With respect to all of the items listed above, the economist has the responsibility to work through each

[3] See page 19 of the May 30, 2013 EB-5 Adjudications Policy Memorandum.

[4] Including estimating tools like IMPLAN, RIMS II, the REMI model, the REDYN model, and custom tools-models that have been successfully employed in EB-5 project adjudications to count project-induced job creation through the years.

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of those items to present a fully defensible estimate of job impact. Project developers and potential EB-5 and other investors are going to make decisions based on the amount of estimated job creation that is eligible for use under the EB-5 Program. If the job impact estimate is not done according to USCIS rules, this can result in over-subscribed deals and other problems for EB-5 investors, project sponsors, and EB-5 marketing professionals.

First, most of a development project's hard costs materials and labor (e.g. steel, cement, wood, other structural construction materials—including interiors, associated labor expense, etc.) are relatively low-risk EB-5 program-eligible construction expenditures that are typically included in EB-5 impact analyses. Expenditures for site work (including excavation) and shoring, demolition (if any), and expenditures for utilities and items such as hardscapes also are expenditure items that are typically included in job impact analyses associated with construction activity. Items such as General Conditions and Hard Cost Contingency expenses at times can be included,[5] although they are "higher risk" than the more straight-forward hard costs listed above. A good rule of thumb is to try to think about whether including jobs from such expenditures are really needed to make the project's overall capital stack work (versus the higher level of adjudication risk including them could cause during the I-526 petition adjudication), and look down the road to try to anticipate what will be needed to "prove" those expenditures at the I-829 removal of conditions adjudication. If they are not needed to make the project go forward (including considerations of what they might add to the "surplus jobs" marketing cushion), these project costs should likely be excluded. In particular, remember if you include contingency expenditures, they need to be allocated to actual expenditure categories in order to be approvable at the I-526 phase, and if they are going to be meaningful to help prove job creation at the I-829 removal of conditions phase.

There also are a number of other "soft construction costs" that can be considered for inclusion in an economic impact study. The most typical of these costs are expenditures for architects, engineers, environmental review, marketing, legal (as long as they are non-EB-5 legal expenses), and other professional consultant expenses—as long as they are paid to competent 3rd party professionals. Other "soft cost" expenditures that appear to be allowed included expenditures for insurance and for certain types of financing costs. But these financing costs are "very risky" to include in any impact study, and are highly dependent on the views of the case officer assigned to review your file. In most cases, these expenditures generate a relatively few number of jobs relative to the level of case adjudication risk including these "very risky" expenditures in any economic impact study entails. We almost never include such expenditures because the risk of including them nearly always outweighs the prospective job creating and corresponding capital benefit of including them.

In addition to those risky, but still potentially eligible soft cost, project expenditures, there are a number of those costs that are not appropriate for inclusion in any construction impact analysis. These include expenditures for cost items such as state and local permit and other related costs, local property taxes, various state and local fees, and expenditures for local, state and regional impact fees-exactions (e.g. payments in lieu of taxes and other development mitigation fees). In addition, project expenditures for land acquisition or control also are not eligible to be included in construction impact analyses—even though EB-5 investor capital can clearly be used for such expenditures. Since land acquisition expenditures create no net new jobs, the job creation from other project expenditures will need to carry the burden of creating enough new jobs "to cover" that spending as part of the total project capital stack. This means that job creating spending elsewhere in the project will need to create enough jobs

[5] After all, these costs do represent legitimate expenditures needed to complete any construction project.

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to off-set the land acquisition expenditures which will have to be scored as creating zero new jobs for EB-5 program purposes.

Two other common project expenditures used in construction projects under the EB-5 Program deserve mention, these include: (1) expenditures for Tenant Improvements, and (2) expenditures for Furniture, Fixtures & Equipment (FF&E). Regarding the first, the process for including them in an Eb-5 job impact analysis is straight-forward. Expenditures should be categorized by NIACS activity category and direct and indirect jobs estimated separately. If any of those tenant Improvement expenditures are to be undertaken by a third party (that is other than the general contractor or equivalent), procedures must be in place to obtain the required expenditure detail so that those expenditures can be included in both the I-526 stage job impact study and then "proved" later on as the project's investors are filing their I-829 petitions. Regarding the second, FF&E expenditures are surely legitimate expenditures that should be included in any construction project impact analysis. Such expenditures need to be "margin adjusted" to comport with "best practices' in economic-job impact study assessments. Many economic impact analyses used under the EB-5 program omit this critical analytical step when assessing the job impacts associated with these expenditures. Without margin adjustment, projects run the risk of over-estimating the job impacts associated with those expenditures.

All Expenditures Must Include Inflation Adjustment to the Input-Output Tool's "Base Year."

After carefully sorting through and estimating the expenditures to be included in the construction project's economic impact study, all dollar amounts must be adjusted for inflation to the base year of selected input-output tool. Input/output model coefficients and multipliers use data from a historical base year. As a result, current dollar values and future dollar vales have to be translated (or deflated) to the values of the base year used in the input/output model in order to properly arrive at the correct dollar amount that properly reflects the "change in final demand" for each expenditure category. Most input-output tools now use calendar year 2009 as the base year and some are now using calendar year 2012 as the base year. A lot of EB-5 projects we see use simple historical inflation rate averages to deflate future dollar values. In most cases that approach will not be reflective of inflation rates in the future. Another option, which we tend to use, is to acquire a credible forward-looking inflation forecast from a reputable forecaster such as Moody's Analytics or IHS Global Insights which can provide a fully considered forward-looking inflation forecast which will be far more credible for more accurate in estimating future inflation. Using an arbitrary historical average of either a general inflation index change or even a gauge that measures historical construction cost inflation is unlikely to go a good job in estimating future construction cost price changes, and it is then likely the construction expenditures will not be properly deflated for use with the chosen multipliers or input-output model.

Properly Aggregating the Job Impact Study's Results

When totaling up the result of any economic impact study, there are important considerations: (1) the EB-5 Program requirement that direct jobs must last for at least two years (discussed above); (2) the admissibility of a request to attribute jobs to a regional center (and therefore make them eligible for the 10 jobs per EB-5 investor math), including jobs both inside and outside the geographic scope of a Regional Center; and (3) the EB-5 Program requirement that the requested jobs occur within a reasonable time. Job impact analysis results from the selected input-output tool should be carefully extracted and laid out on an annual time line for each of the construction project's NAICS activity categories, ideally for the geographic area both within and outside of the sponsoring regional center's geography. Although impact results for narrower geographic regions can still be used for filing

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purposes, projects should understand that they could be leaving a significant number of potentially EB-5 program eligible jobs "on the table" if they do not use total U.S. job creation. In other words, estimation methods which count job creation impacts within only one county inside a regional center not only miss out on jobs that are created in the rest of the regional center geography, but also in the rest of the U.S. outside of the regional center. This especially affects projects which rely heavily on construction job creation, as construction is considered a "goods-producing" sector that employs material inputs that can only be acquired through a geographically dispersed, perhaps nationwide, supply chain. In our experience we have seen numerous examples where the bulk of construction materials are sourced from outside of a given regional center geography, especially in rural or geographically isolated project locations.

When aggregating job impacts for EB-5 program purposes, jobs created by construction activities should not be summed across multiple years or multi-year construction expenditures should not be summed as if they had occurred within a single year. This is a potential technical error in that it often double counts all economically direct jobs, and elevates the risk that your project may become "over-subscribed." The USCIS rules make clear that they require job impact studies to properly count EB-5 Program-qualifying **jobs.** There is no provision for counting **job-years—the critical variable for EB-5 is not 10 "job-years" per EB-5 investor**. Once the job impact analysis has been completed and fully double-checked, the impact analysis should transparently lay out the job impact estimates by NAICS category and by calendar or project year per the clear statement of Nicholas Colucci, Chief of the Immigrant Investor Program back in May of 2015. Results then should be aggregated for EB-5 Program purposes carefully following the program's precedents and rules. The report should transparently provide the USCIS case officer with the following: (1) the economic impact study's input-output model inputs and corresponding specifications by year; (2) the total number of jobs created both inside and outside the Regional Center (or for the United States economy as a whole) by year; and (3) the jobs the petitioner is requesting for EB-5 Program job benefits to be attributed to the regional center (which are to be used in the 10 jobs per EB-5 investor math).

Conclusion

Properly counting the economic impacts (including job impacts) can be a complicated matter, but doing so according to "best practices" approaches is fundamental to having a successful EB-5 project. Under-counting job impacts for EB-5 Projects may leave otherwise EB-5 program eligible jobs out of the 10 job per EB-5 investor math to the detriment of the EB-5 share of the project's capital stack or provide a surplus jobs cushion that is smaller than otherwise would or could be. Over-estimating EB-5 Program eligible job impacts can lead to projects that are over-subscribed for EB-5 Program purposes, and can lead to significant problems at the I-829 petition job proving adjudication. Beyond those concerns, the EB-5 Program is a job creating program, and accurately accounting for the program's job creation impacts from project activity is crucial to the EB-5 Program's long term success.

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The Development of EB-5 Law: Construction Jobs

It should be noted that the issue of construction jobs is not directly addressed in the current regulations. Under 8 CFR § 204.6 (g)(1), a foreign investor may invest in a new commercial enterprise "provided each individual investment results in the creation of at least ten full-time positions for qualifying employees." Historically, given the intermittent and seasonal nature of construction jobs, such jobs could not be counted towards fulfilling the job creation requirement.

[7] US citizens, LPR's, Asylees and certain EAD holders.

[8] *Matter of Ho*, (WAC-98-072-50493 July 31, 1998).

[9] Office of Administrative Appeals, Filed by Texas Service Center, File No. SRC 08 064 52066 (dated January 6, 2010)

[10] AAO decision dated January 6, 2010, File No. SRC 08 064 52066)

[11] 5 U.S.C. § 706; *McDade v. West*, 223 F. 3d. 1135, 1139 (9th Cir. 2000)

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