

NEW JOB CREATION AND TEA RULES IN THE EB-5 REFORM AND INTEGRITY ACT OF 2022: ANALYZED AND EXPLAINED



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The EB-5 Reform and Integrity Act of 2022 (RIA) reinstated the Targeted Employment Area (TEA) rules instituted by USCIS in the EB-5 Immigrant Investor Program Modernization rule in November 2019, and implemented several new regional center project job-creation rules. The TEA rules require designation by USCIS and requires high unemployment TEAs to count only directly adjacent census tracts to the project tract. The new job-creation rules allow counting direct job creation for projects with construction periods less than 24 months, but also places limits on the percentage of total jobs allowed for indirect job creation.

TEAs

The TEA rules are familiar to most in the EB-5 area as they were implemented in 2019. The rules require first that USCIS adjudicate the status of TEAs (rather than individual states as was predominantly the case previously); and second that only directly adjacent tracts to the project tract can be considered for TEAs. The directly adjacent requirement severely limits the geographic area that can be considered, in some cases, to just a few city blocks. This requires TEAs to be determined by economic conditions near the project site and not in the surrounding area where the labor force might also be recruited. Even though the labor force to staff the construction at a site in, say, downtown Los Angeles could come from 10-20 miles away, the new law focuses only on a very small geographic area near the project site, rather than where the employees might come from.

Job Creation

The new job creation rules in the RIA are contained in full text in the following three subparagraphs:

INA 203(b)(5)(e)(IV) INDIRECT JOB CREATION.- (I) IN GENERAL.- The Secretary of Homeland Security shall permit aliens seeking admission under this subparagraph to satisfy only up to 90 percent of the requirement under subparagraph (A)(ii) with jobs that are estimated to be created indirectly through investment under this paragraph in accordance with this subparagraph. An employee of the new commercial enterprise or job-creating entity may be considered to hold a job that has been directly created.

INA 203(b)(5)(e)(IV)(II) CONSTRUCTION ACTIVITY LASTING LESS THAN 2 YEARS.- If the jobs estimated to be created by construction activity lasting less than 2 years, the Secretary shall permit aliens seeking admission under this subparagraph to satisfy only up to 75 percent of the

requirement under subparagraph (A)(ii) with jobs that are estimated to be created indirectly through investment under this paragraph in accordance with this subparagraph.

INA 203(b)(5)(e)(V)(II)(cc)
CONSTRUCTION ACTIVITY JOBS.- If the number of direct jobs estimated to be created has been determined by an economically and statistically valid methodology, and such *direct jobs* are created by construction activity lasting less than 2 years, the number of such jobs that may be considered direct jobs for purposes of clause (iv) shall be calculated by multiplying the total number of such jobs estimated to be created by the fraction of the 2-year period that the construction activity lasts.

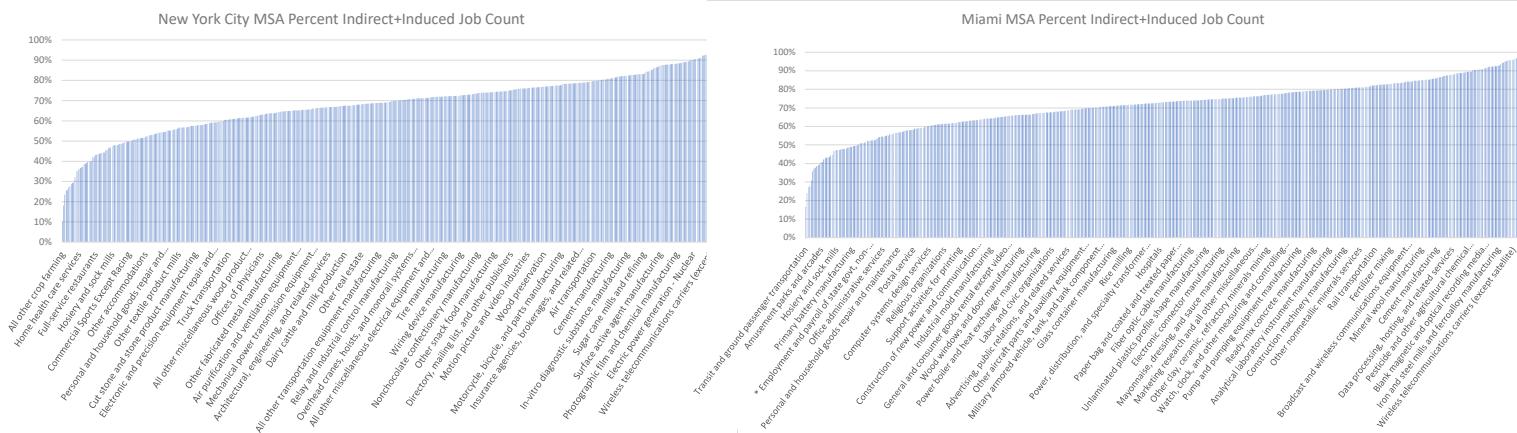
These new rules are aimed specifically at job-creation estimated with economic models such as *IMPLAN* or *RIMS II* for regional center projects and do not apply to *direct* EB-5 projects at all. The following three points describe *our interpretation* of the new rules more succinctly (note that as of the date of this article, USCIS has not provided their guidance, policy manual or interpretation of the job creation language in the RIA):

- 1) (Indirect + induced) jobs in regional center projects cannot count for more than 90% of the total job count, or alternatively, the direct job count must be at least 10% of the total job count.
- 2) If the construction period of a project lasts less than 24 months, indirect jobs cannot count for more than 75% of the total job count, or alternatively, the direct job count in such cases must be at least 25% of the total job count.
- 3) If the construction period of a project lasts less than 24 months, the direct job count from construction must be limited by multiplying the original direct job count by the fraction of the 24-month period that the construction lasts.

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FIGURE 1: NEW YORK CITY AND MIAMI MSA *IMPLAN* MULTIPLIERS PERCENT INDIRECT + INDUCED



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In the remainder of this article, we analyze each of the three items above in more detail. We also raise questions about the interpretation of the new rules in the final section of the article.

1) Indirect + Induced Job Count Cannot Exceed 90% of Total Job Count

Based on our interpretation of the RIA, this requirement will seldom have any impact for EB-5 job creation estimates for two reasons: 1) few industries in the U.S., whether in the EB-5 area or not, have an (indirect + induced) job threshold as high as 90% relative to the total size of the total multiplier (direct + indirect + induced) effect, and 2) the main industries which are the focus of EB-5 projects, such as hotels, condominiums, office buildings, multi-family residential housing, restaurants, etc., have a much more even split between direct and (indirect + induced) multipliers.

Figure 1 illustrates the (indirect + induced)/total multiplier ratios in the New York City (NYC) and Miami, FL Metropolitan Statistical Areas (MSA) using the 540+ industries in *IMPLAN* (*IMPLAN Group, LLC*) for model data year 2019. It is clear for both areas that very few industries reach the 90% mark of (indirect + induced) to total. Looking at the averages for all multipliers in each area, the ratio of (indirect + induced)/total is 66.4% for the Miami MSA and 61.5% for the NYC MSA.

So, what are the industries that have indirect job creation greater than 90%? Figure 2

FIGURE 2: NEW YORK CITY AND MIAMI MSA *IMPLAN* MULTIPLIERS PERCENT
INDIRECT + INDUCED GREATER THAN 90%



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illustrates these industries for the same NYC and Miami MSAs. The NYC area has far fewer industries than the Miami area having (indirect + induced)/total multiplier ratios over 90%. What we see in both the NYC and Miami MSAs is predominantly manufacturing, electrical power generation and petroleum industries, i.e., industries, typically run with machinery and few on-site workers. More importantly, we see none of the traditional EB-5 industries as mentioned above.

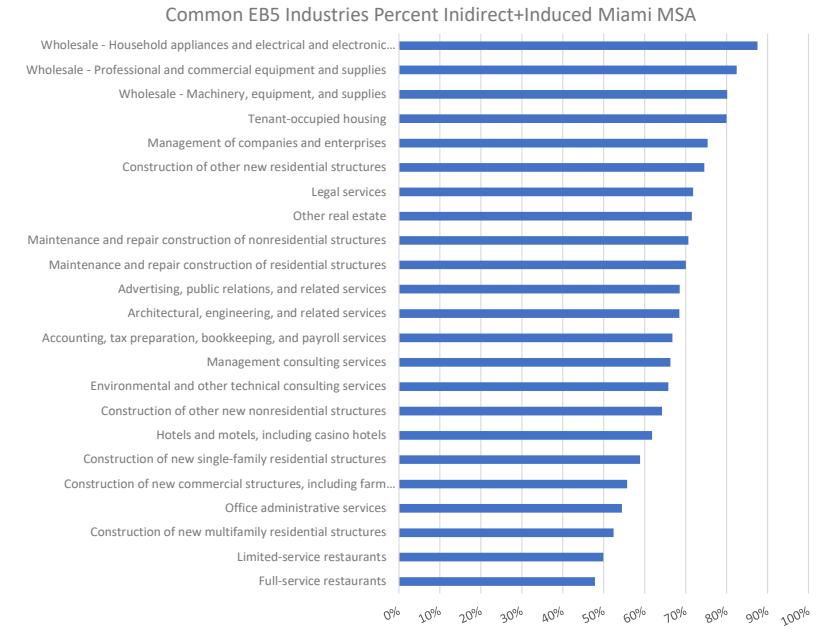
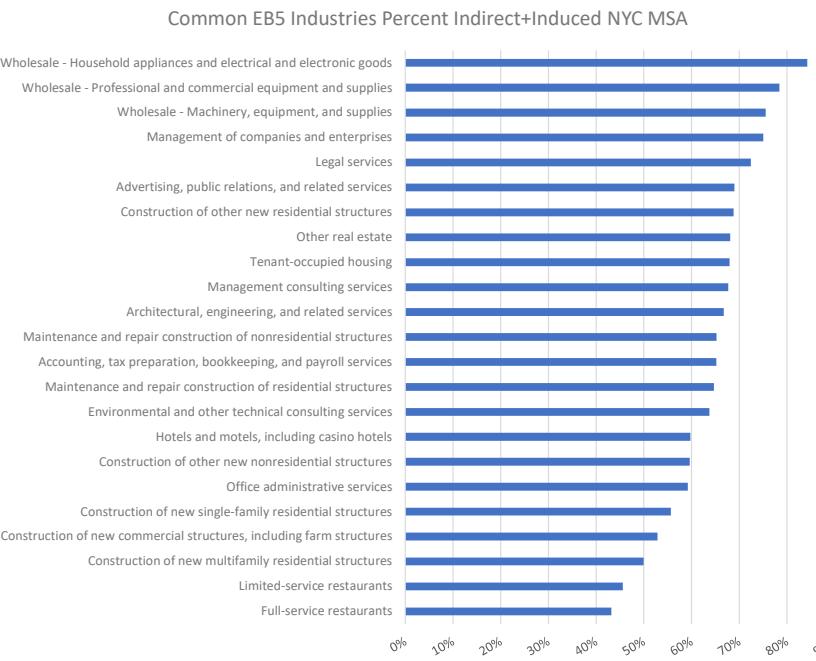
2) For Construction Less than 24 Months, Indirect Jobs Must Be 75% or Less of the Total Job Count

Figure 3 illustrates the (indirect + induced)/total multiplier ratios for the NYC and Miami MSAs. We see that except for Wholesale goods sellers and Management of Companies near the top of each table, most of the traditional EB-5 industries have the indirect to total ratio less than 70-75%. Note also that all the construction sectors in both tables in Figure 3 are less than 75%. This is significant because most of the jobs created in economic model-based job creation in the EB-5 industry come from construction-related activities and not operations. This of course implies that even if construction is less than 24 months, the 75% constraint will not be an issue, at least on its own, because most of the construction industry sectors as well as the operations sectors have indirect to total ratios much less than 70%!

3) For Construction Less than 24 Months, Direct Jobs Must be Calculated as the Original Direct Job Count Multiplied by the Fraction of the 24-month Period that Construction Lasts

When the new RIA was first passed, few seemed to comment on the fact that, throughout the entire history of EB-5, direct jobs could not be counted at all for economic model-based job calculations if the construction period was less than 24 months. Therefore, this addition to the RIA of being able to pick up some direct job creation for shorter construction periods appears to be a boon to the industry for many smaller projects. A simple example of item 3) is the following: if the original direct job count is 100 jobs and the construction time period lasts 12 months, the number of direct jobs the

FIGURE 3: COMMON EB-5 INDUSTRIES (INDIRECT + INDUCED)/TOTAL MULTIPLIER RATIOS IN THE NEW YORK CITY AND MIAMI MSA



project could count is $12/24 \times 100$ or 50 jobs.

Figure 4 shows the result of applying the construction time period limits on common construction multipliers in the NYC and Miami MSAs. The figures show the total multiplier for construction activity after applying the construction time ratio on the direct effect component of the total multiplier as the construction time period falls from 24 months to just 3 months.

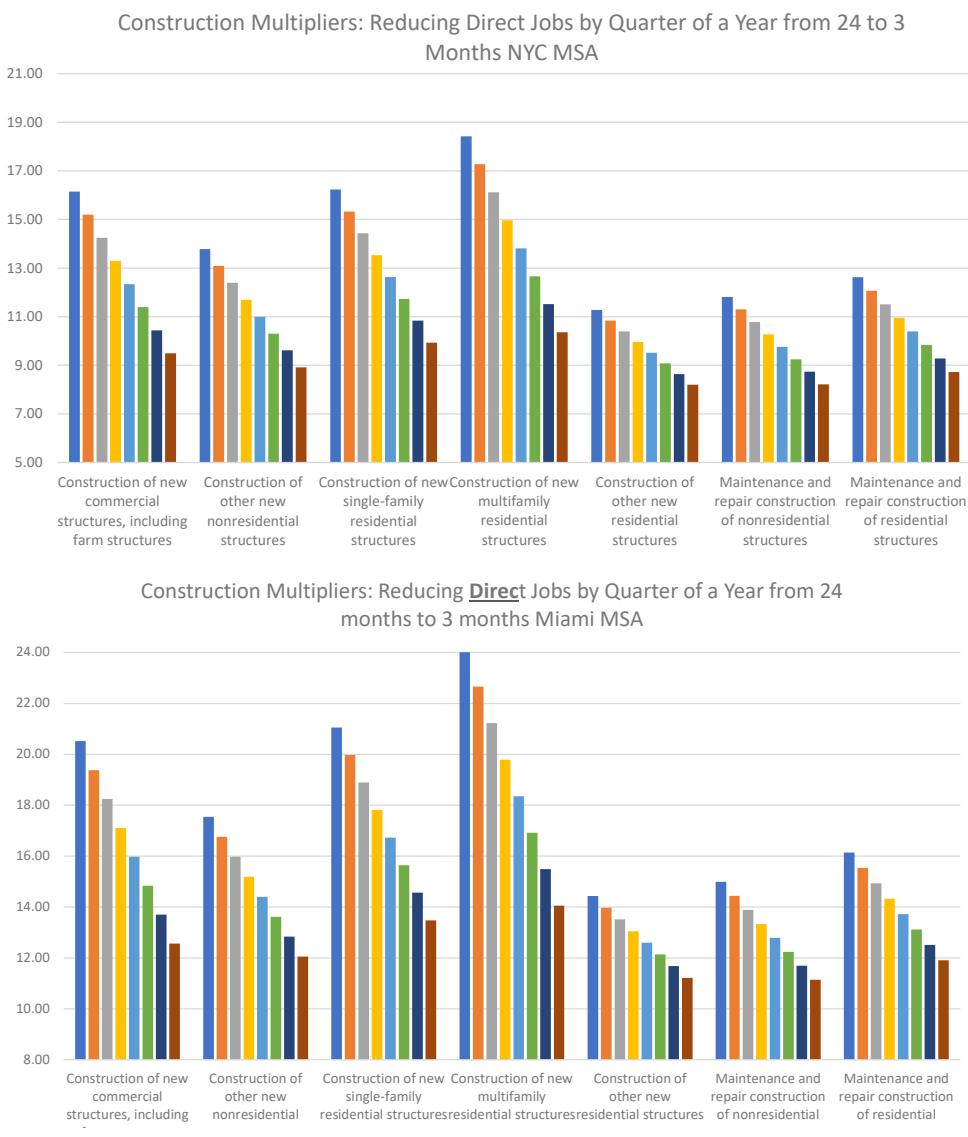
Taking the industry sector “Construction of new multifamily residential structures” which

is in the middle of the first panel for NYC as an example, the total multiplier starts at 18.43, or 18.43 total jobs created per \$1 million dollars spent in this sector. The components of this multiplier are 9.22 direct jobs created per \$1 million spent, leaving $18.43 - 9.22 = 9.21$ (indirect + induced) jobs remaining in the full multiplier. As we apply the construction time ratio to the direct multiplier component only, that component falls causing the total multiplier to fall as well. As the construction period falls 3 months from 24 months to 21,

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FIGURE 4: COMMON EB-5 CONSTRUCTION INDUSTRY TOTAL MULTIPLIERS IN THE NEW YORK CITY AND MIAMI MSA AS THE CONSTRUCTION PERIOD IS REDUCED



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the direct multiplier falls from 9.22 to $(21/24) \times 9.22 = 8.07$ leaving the total multiplier at 17.48 jobs per \$1 million spent. Continuing, if the construction period is only 18 months the direct multiplier falls to $(18/24) \times 9.22 = 6.92$ while the total multiplier falls to 17.28 jobs per \$1 million spent. As one can see, this continues monotonically as the construction time period falls until the total multiplier reaches its lowest value of 10.36.

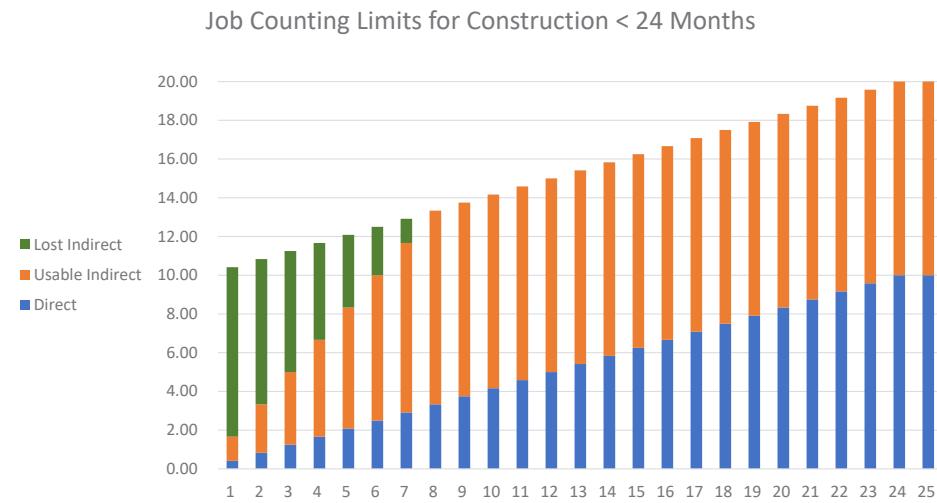
We indicated above that the 75% maximum (indirect + induced)/total job constraint is typically not an issue for most EB-5 projects on its own due to the ratios shown in Figure 3. However, it can be an issue when combined with the third main job creation rule in the RIA requiring a haircut of direct

jobs from construction lasting less than 24 months. As we show below, when the construction period is less than 24 months, causing direct jobs to be limited by the ratio of the construction period to 24 months, the interaction of these two rules can place further limits on total job creation by limiting both direct jobs and (indirect + induced) jobs.

Figure 5 shows a hypothetical construction multiplier in the far right part of the chart of 20 jobs per \$1 million in construction spending with 25 months of construction time period. In this hypothetical, the direct effects and (indirect + induced) effects multipliers are each 10 jobs per \$1 million dollars spent with the direct effect multiplier shown in blue in the chart and indirect in orange. As the duration of construction decreases, moving from right to left in the chart, the direct jobs are cut proportionally as required by the ratio of the construction time in months to 24. For the next 16 months the direct multiplier is reduced but the indirect multiplier remains at 10 jobs per \$1 million. When the construction period is less than 8 months, the direct job cut causes the ratio of (indirect + induced) jobs to total jobs to rise above 75%, which is disallowed by rule 2) above. Therefore, the direct job cuts combined with the 75% maximum indirect job constraint require additional cuts in indirect jobs to retain the 75% requirement. The indirect job cuts are shown in the chart as the green segments of the job count bars. The

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FIGURE 5: THE INTERACTION OF THE 75% LIMIT ON INDIRECT JOBS FOR CONSTRUCTION SHORTER THAN 24 MONTHS



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total constraint can easily be calculated by multiplying the reduced direct job count by 4 to reach the maximum allowable job count. For example, when the construction length has fallen to 6 months, the original total job count would have been 12.5 jobs, but the ratio of indirect jobs to total 10/12.5 is now 80% and indirect jobs must be cut by 2.5 jobs from 10 to 7.5 to retain the ratio of indirect jobs to total jobs of 7.5/10=75%. The new maximum direct job count is $(6/24) \times 10 = 2.5$ direct jobs. Multiplying 2.5 direct jobs by 4 results in a maximum total job count of 10 (in orange) with an indirect job loss also of 2.5 (shown in green) to maintain the 75% indirect to total job count. This multiplication result stems from the 25% maximum direct job count, i.e., one in four, given that indirect jobs must be no more than 75%. Additionally, the indirect job count can be found by multiplying the direct jobs by 3, i.e., 2.5 direct jobs $\times 3 = 7.5$ indirect jobs.

Applying the Rules in Real World EB-5 Projects

Although we have approached this analysis using *IMPLAN* multipliers to show the effects of the new rules on job creation, the practicing economist in the EB-5 field must make any adjustments to actual job creation figures in the economic report. To illustrate, we use the example of a multifamily construction project with \$20 million construction in 2023, \$500,000 each in architectural services and wholesale trade and \$800,000 in management of companies. Rental income is assumed to be \$1.5 million per year for the total complex in year 2024 and this project will be located in the Miami-Fort Lauderdale-West Palm Beach MSA.

Table 1 reports the results of this run in the *IMPLAN* model. The results indicate that if the construction period was 24 months or more the project could generate 499 jobs and support up to 49 EB-5 investors with a maximum potential EB-5 capital raise of \$39.2 million (assuming the project is located in a TEA). Of course, we know that one cannot raise more in EB-5 capital than the project capital expenditures, but this result is relatively common in economic reports under the RIA due to the minimum investment amount per investor in a TEA increasing to \$800,000.

TABLE 1: RESULTS FOR CONSTRUCTION AND OPERATIONS OF A \$20M MULTIFAMILY CONSTRUCTION PROJECT IN THE MIAMI MSA

PROJECT ACTIVITY	IMPACT TYPE	EMPLOYMENT	LABOR INCOME	VALUE ADDED	OUTPUT
Construction 2023	Direct Effect	219	\$14,236,736	\$16,456,375	\$21,026,096
	Indirect Effect	25	\$1,402,071	\$2,384,513	\$4,440,838
	Induced Effect	228	\$12,381,081	\$21,295,424	\$36,059,874
	Total Effect	472	\$28,019,887	\$40,136,312	\$61,526,809
Apartment Rental 2024	Direct Effect	8	\$178,543	\$515,936	\$1,468,244
	Indirect Effect	8	\$368,666	\$632,655	\$1,314,052
	Induced Effect	12	\$674,682	\$1,141,811	\$1,920,136
	Total Effect	28	\$1,221,891	\$2,290,403	\$4,702,432
Totals		499	\$29,241,778	\$42,426,715	\$66,229,241
Maximum Potential EB-5 Investors		49			
Maximum Potential EB-5 Capital			\$39,200,000		

Moving on to the effect of the new rules, we first look at what percent of total jobs the (indirect + induced) jobs represent. Summing these figures in both the Construction and Rental panels of Table 1 results in a total of 273 (indirect + induced) jobs. Dividing this by the total of 499 results in the percent of (indirect + induced) jobs being 54.55% of the total, so we have no problem with rule 1) above that indirect jobs cannot exceed 90% of the total.

Assume that the construction period was less than 24 months, say 8 months. Now, the direct jobs from construction would need to be reduced to $8/24 \times 219 = 73$. The direct job count is now 81 (73+8) and the original indirect job count is 273 with the total job count now at 354 (81+273). However, now the indirect job count is too high resulting in more than 75% indirect jobs $(273/354) = 77.1\%$. We need to reduce the indirect job count which lowers the total job count. The new total jobs count can be calculated as $81 \times 4 = 324$, implying that indirect jobs are now $324 - 81 = 243$ or using the other method mentioned above $81 \times 3 = 243$ and the total job count is now $81 + 243 = 324$. Of course, the maximum of 32 EB-5 investors still results in \$25.6 million or more than enough to fund this example project.

Remaining Questions

As the industry waits for further guidance from USCIS on the larger job creation items, the drafting of the RIA also leaves at

least two additional open questions related to the job-count:

First, rule 2) indicates when the construction period is shorter than 24 months, no more than 75% indirect jobs are allowed. It is not clear if this constraint applies to all job creation from a project or only to construction jobs, which would then allow for up to 90% indirect jobs from operations. It also seems that if the rule did apply to both, jobs from construction and operations, that it would unfairly punish those projects without operations such as for sale single-family and multi-family housing where there is no rental income. This issue is also relevant for the second question below.

Second, rule 3) indicates a reduction in direct jobs by the fraction of the 24 month period for “jobs created by construction activity.” What is clear from the example above is development or construction activity typically includes other items in addition to hard construction sectors such as architects & engineering, wholesale trade, management, FF&E and the like. Should this reduction in direct jobs be applied to all sectors in the development/construction category or only to the hard construction sector?

Until USCIS publishes regulations or, more likely, explores this issue in adjudications, practitioners should exercise caution in job-creation calculations and EB-5 offerings should include good job creation cushion to help mitigate risks during this period of uncertainty. ▶