

**Chapter 22.4 (2)(A)<sup>1</sup>**

An alien investing in a new commercial enterprise affiliated with and located in a regional center is not required to demonstrate that the new commercial enterprise itself directly employs ten U.S. workers; a showing of indirect job creation and improved regional productivity will suffice. Implementing regulations for the Pilot Program are found at [8 CFR 204.6\(m\)](#) .

**Note**

**Direct jobs** are those jobs that establish an employer-employee relationship between the commercial enterprise and the persons that they employ. Regional centers typically use the RIMS II or IMPLAN economic models to determine the number of indirect jobs that will be created through investments in the regional center's investment projects.

**Indirect jobs** are the jobs held by persons who work for the producers of materials, equipment, and services that are used in a commercial enterprise's capital investment project, but who are not directly employed by the commercial enterprise, such as steel producers or outside firms that provide accounting services.

There is a sub-set of indirect jobs that are calculated using economic models that are known as induced jobs. Induced jobs are those jobs created when direct and indirect employees go out and spend their increased incomes on consumer goods and services.

**Chapter 22.4 (2)(C)(4)(D)(iii)**

(iii) Clarification of the Meaning of Full-time Position. Section 203(b)(5) of the INA requires that the investment in a new commercial enterprise will create full-time employment for not fewer than 10 qualified employees. The INA further defines full-time employment as "employment in a position that requires at least 35 hours or service per week at any time, regardless of who fills the position." Adjudicating ISOs should keep the following points in mind when determining if positions meet this requirement:

Economic input/output (I/O) models, such as RIMS II or IMPLAN, used to evaluate the calculation of the number of indirect jobs (including induced jobs) created through a commercial enterprise affiliated with a regional center do not distinguish between full-time and part-time jobs. In other words, the job creation results of the multipliers in the economic I/O models do not distinguish between the full-time and part-time nature of the positions. Therefore, the number of indirect jobs quantified through the I/O model analysis will be considered to be full-time and qualifying for EB-5 purposes. Accordingly, determinations

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<sup>1</sup><http://www.uscis.gov/portal/site/uscis/menuitem.f6da51a2342135be7e9d7a10e0dc91a0/?vgnextoid=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&vgnnextchannel=fa7e539dc4bed010VgnVCM1000000ecd190aRCRD&CH=afm>

regarding whether jobs qualify as “full-time” are only relevant to the analysis of direct jobs created by a commercial enterprise claiming the creation of direct jobs as a result of the EB-5 capital investment.

USCIS has interpreted the full-time employment requirement to exclude jobs that are intermittent, temporary, seasonal or transient in nature. See, e.g., Spencer Enterprises v. U.S., 229 F.Supp.2d 1025 (E.D. Cal. 2001). Historically, construction jobs have not been counted toward job creation because they are seen as intermittent, temporary, seasonal and transient rather than permanent. USCIS, however, now interprets that direct construction jobs may now count as permanent jobs if they:

- Are created by the petitioner’s investment; and
- Are expected to last at least two years, inclusive of when the petitioner’s Form I-829 is filed.

Although employment in some industries such as construction or tourism can be intermittent, temporary, seasonal or transient, officers should not exclude jobs simply because they fall into such industries. Rather, the focus of the adjudication should be on whether the direct positions, as described in the petition, are continuous full-time employment rather than intermittent, temporary, seasonal or transient.

**For example**, if a petition reasonably describes the need to directly employ general laborers in a construction project that is expected to last several years and require a minimum of 35 hours per week over the course of that project, the positions would meet the full-time employment requirement. However, if the same project called for electrical workers to provide services as direct employees during three to four five week periods over the course of the project, such positions would be properly deemed to be intermittent and not meet the definition of full-time employment.

Generally, it is the position that is critical to the full-time direct employment criterion, not the employee. Accordingly, the fact that the position may be filled by more than one employee does not exclude a position from consideration as full-time employment.

**For example**, the positions described in the above bullet would not be excluded from being considered full-time employment if the general laborers needed to fill the positions varied from day to day or week to week, as long as the need to directly employ general laborers in the position remains constant. This interpretation is consistent with 8 CFR 204.6(e), which includes job sharing arrangements as part of the regulatory definition of full-time employment.

It is important to note, however, that this interpretation does not override the regulatory definitions of employee and full-time employment at 8 CFR 204.6(e). Thus, direct jobs must still be filled by qualifying employees and not by independent contractors. Positions filled by independent contractors are not qualifying direct jobs and may only be credited for EB-5 job creation purposes in petitions involving commercial enterprises that are affiliated with a

regional center. In addition, multiple part-time positions may not be combined to create one full-time position, unless those part-time jobs can be shown to be part of a job-sharing arrangement.

Full-time employment relating to the creation of direct jobs as defined in 8 CFR 204.6(e) means year-round employment and not seasonal full-time employment. Full-time employment consists of 35 hours a week. Seasonal positions do not qualify for purposes of the full-time employment requirement for direct jobs.