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Rebutting Speculative Economic Loss Claims of Immigrants and Illegal Aliens: Considering Reverse Immigration Phenomena

Defendants are encountering an increasing number of lost earnings claims of recent immigrants. Often these immigrants are employed in industries, such as construction, although they often are employed in other industries which are lower paying. The typical scenario is that such plaintiffs, through their economic experts, put forward long term projections of lost earnings based upon a limited earnings history that is frequently also an *undocumented earnings history*. Sometimes, the claims are legitimate, but too often they are speculative. In order to rebut the speculative claims, defendants need to better understand the basic economics of the labor market for immigrant workers.

Role of the Economy and Immigration

One of the main factors determining the flow of immigrants into the United States is the wage differential and availability of jobs in the U.S. labor market relative to other countries such as an immigrant's originating country. The stronger the U.S. labor market and the higher U.S. wages are, the greater the incentive of foreign workers to leave their home country and to seek out more lucrative opportunities in the U.S. The central role of the performance of the economy in determining worker migration flows has been widely documented in the labor economics literature.

When the U.S. economy is strong, as it was between 2004 and most of 2007, the demand for labor is high and opportunities for foreign workers abound. During that period we had an unusual housing bubble and the construction industry was booming. This led to an increase in job opportunities in construction – some of which were filled with foreign workers. Some of these workers came to the U.S. legally and others did not. Many used their higher income to send monies back to relatives in their home country. Unfortunately, this broad phenomena came to an end for many such workers when the economy entered a recession in January 2008. The ensuing economic downturn had many adverse ramifications for immigrant workers.

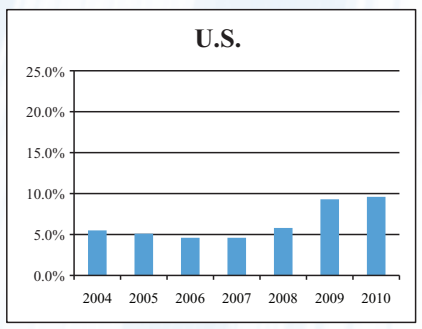
Lost Earnings Claims and the Performance of the Economy

Some immigrant workers were injured while here in the U.S. and filed lawsuits seeking to recover alleged damages. A common scenario is that their economist has measured damages through a forecast that is based upon limited earnings derived from an unusually booming economy. These claims are often speculative for a variety of reasons.

Reverse Immigration

When the job market turned down in 2008, the U.S. unemployment rate rose sharply (see Figure 1a). Total U.S. unemployment rose to its highest level since the Great Depression – 10.1%. While this rate is troublingly high, it very much understates the state of the labor market for workers in certain industries as well as immigrants in general. Construction is quite cyclical and the unemployment rate in the construction industry in 2010 revolved around 20% - comparable to the overall unemployment rate in the Great Depression (see Figure 1b). However, this is the average rate for all workers. The rates for immigrants, especially less educated immigrants, are typically much worse.

Figure 1a: **Unemployment Rates: 2001-2010**



Source: Bureau of Labor Statistics

Figure 1b: **Unemployment Rates: 2001-2010**

Source: Bureau of Labor Statistics

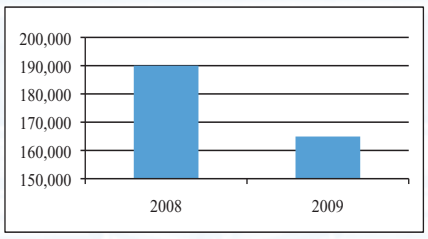
Reverse Migration: A Global Phenomena

The reverse immigration trend affects not just the United States but is part of a broader, global phenomenon. That is, global migration flows from less developed to developed, richer economies, have reversed for this first time since the Great Depression. There are several reasons for this. For better educated workers from countries such as China, India and Brazil, they may find better opportunities in their home country. For less educated and skilled workers, they may find good opportunities in countries such as the U.S. when the economy is strong, but the doors to employers closed when the economy turned down. Many of these workers were forced to return to their home countries as they could not secure jobs in the U.S. and could not afford the higher cost of living in America. Other workers choose to stay in their home countries rather than go to a weaker U.S. labor market that holds few opportunities for them (see Figure 2 using Mexico as an example).

Changing Employment Prospects of Immigrants

Immigrants are often the most recently hired and some of the first to be laid off when the economy turns down. These workers are often less educated. The unemployment rate for less educated workers is much higher than that of college educated workers. These factors combined to make the labor market extremely difficult for many recent immigrants. This, in turn, has led to *reverse immigration* where workers have been returning to their homelands in increasing numbers. For some, such as immigrants from Brazil or India, they eagerly return home as their economies are booming. For others, such as those from Mexico or other Latin American countries, they have little hope of securing jobs in the U.S. and cannot afford the higher costs of living in America. Instead of sending money back home, we are seeing remittances reverse patterns with more monies being sent from the home countries to help workers pay their U.S. expenses or to have enough money to return home.

Figure 2: **Persons Obtaining Legal Permanent Resident Status in the U.S. from Mexico**

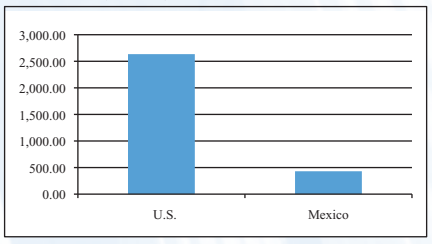


Source: Department of Homeland Security

Relative Earnings: U.S. versus Home Country

The relevance of this phenomenon to personal injury litigation is that injured immigrants may seek to base their earnings claims on the short term earnings they enjoyed during an unusual booming labor market which no longer exists and has not existed for some time. Many of the workers who claim long term lost earnings from the U.S. labor market would have likely lost their jobs. Many of these workers would have returned to their home country. If these particular workers are injured and cannot work, their losses should not be based upon the higher earnings in the U.S. but on the earnings they would have made in their home country. This is often a fraction of what comparable U.S. earnings are (see Figure 3 using Mexico as an example).

Figure 3: **Monthy Wage Rates in U.S. and Mexico, 2008 (in U.S. $)**



Source: Bureau of Labor Statistics
ILO Department of statistics

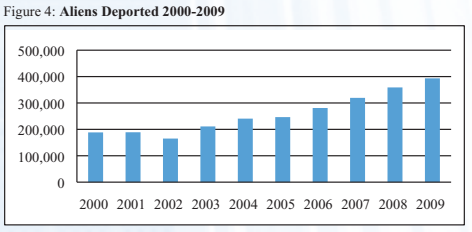
Ramifications for Life Care Plans

In cases where plaintiffs are seeking to recover the costs of future care, the reverse immigration phenomena can have important ramifications. For example, often one of the major costs categories of life care plans is the cost of less skilled care such as home health aides. While such costs are much lower and feature much lower rates of inflation than the more skilled components of U.S.-based life care plans, such as physician or hospital care, they are much lower in developing countries compared to the U.S. The cost of even skilled care provided in developing nations can be a fraction of the costs of comparable care provided in the U.S. If it can be established that it is likely that the plaintiff would have returned to their home country, then these lower care costs of their home counties may be the more relevant ones.

U.S. Immigration Crackdown

Even prior to 9/11, the Immigration and Naturalization Service had been giving greater scrutiny to illegal immigrants. That has intensified in recent years. This has led to increased deportations as well as a crackdown on U.S. employers who flaunt immigration regulations (see Figure 4). The combination of these effects has been to make the U.S. labor market even more challenging for illegal immigrants who now face greater probabilities of being deported – even if they are able to secure work during this trying period.

Figure 4: **Aliens Deported 2000-2009**



Source: Department of Homeland Security

The probability of being deported is a factor that needs to be incorporated into plaintiff's economic loss projections for illegal workers. Usually it is not. Failure to do so adds another speculative element to such lost earnings claims.

Conclusion

Many economic experts retained by plaintiffs treat lost earnings claims of immigrants the same way they would for U.S. citizens who have been in the labor market for many years. Often this results in highly speculative lost earnings claims. It also ignores the abundant labor market research literature which contradicts such a simplistic approach. In such cases, defense counsel needs to retain an economist who is knowledgeable in the crucial labor market differences between U.S. workers and recent immigrants. Injured immigrants can have legitimate economic losses resulting from that personal injury. However, those losses need to be accurately measured by incorporating all of the relevant labor market factors. Defendants need to require the plaintiff's economic expert to address some of the important labor markets factors we have discussed. Failure to do so may result in a greatly exaggerated damage amount.