UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant, vs. Maka's Akamai Service aka Maka's Akamai Service, Inc. dba Akamai Yard Service Tree Trimmer, Respondent; 8 U.S.C. Section 1324A Proceeding; Case No. 88100015.

DECISION AND ORDER

HENRY M. TAI, Administrative Law Judge

Statement of the Case

The Respondent, Maka's Akamai Service aka Maka's Akamai Service, Inc. dba Akamai Yard Service Tree Trimmer (hereinafter referred to as `Maka's''), was charged by the Complainant, United States of America, with violations of the Immigration Reform and Control Act of 1986 (hereinafter referred to as ``IRCA''). The specific violations at issue are set forth in sections 274A(a)(1)(A) and 274A(a)(1)(B) of the Immigration and Nationality Act (hereinafter referred to as ``INA''), for knowingly hiring an alien who was unauthorized to work in the United States after November 6, 1986 and for failing to comply with the Employment Verification System in completing documentation to establish an employee's identify and employment eligibility.

The Immigration and Naturalization Service (herein after referred to as ``INS'') made an educational visit to the residence of the Respondent's owner, Lualeni Maka, and furnished a Handbook for Employers on August 27, 1987 (Exhibit C-5). On August 31, 1987, a First Notice of Inspection was served on Mrs. Maka, Lualeni Maka's mother (Exhibit C-6). By a letter dated September 1, 1987, Respondent's attorney, George Noguchi, informed the INS that no I-9 Forms were available because no employees of the Respondent were hired after November 6, 1986 (Exhibit R-A). On September 8, 1987, the INS served a Second Notice of Inspection on Mrs. Maka, Lualeni Maka's wife (Exhibit C-7). A Warning Citation was again served on Mrs. Maka, Lualeni Maka's wife, on October 20, 1987 regarding the Respondent's failure to furnish I-9 Forms (Exhibit C-8). On October 26, 1987, a Third Notice of Inspection was served upon the Respondent's attorney, George Noguchi

(Exhibit C-9). By letter dated October 30, 1987, Mr. Noguchi informed the INS that the Respondent had not hired any employees after November 6, 1986 (Exhibit C-10). The INS on November 5, 1987 served a subpoena on Respondent, again through its attorney, George Noguchi, for payroll and personnel records (Exhibit C-12). Mr. Noguchi responded on November 9, 1987 by a letter regarding the status of the Respondent's employees (Exhibit C-13). On January 4, 1988, a Notice of Intent to Fine was served upon Respondent for knowingly hiring an unauthorized alien after November 6, 1986 and for non-compliance of the verification requirements with regard to the hiring of employees after November 6, 1986. On February 23, 1988, the INS filed a Complaint with the Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer (hereinafter referred to as ``OCAHO''), charging the Respondent with the above-referenced violations of the IRCA.

After due notice, a hearing was held in this matter commencing July 12, 1988, before the undersigned. Dayna M. Dias and Scott A. Dunn, represented the Complainant, United States of America. Respondent, Maka's Akamai Service aka Maka's Akamai Service, Inc. dba Akamai Yard Service Tree Trimmer, was represented by George K. Noguchi. The undersigned has carefully considered all the documents identified in the record as exhibits, the testimony at the hearing, and arguments presented to determine whether the Respondent was in violation of the IRCA, specifically, sections 274A(a)((1)(A) and 274a(a)(1)(B) of the INA.

Summary and Evaluation of the Evidence

The Respondent argues that the Notices of Inspection were defectively served upon the Respondent, and therefore the subsequent citations are rendered void. However, the undersigned finds that as service of the Complaint was proper and such Complaint incorporates the Notices of Inspection and Intent to Fine, even assuming arguendo that the service of the Notices of Inspection was improper, proper notice was given to the Respondent through the service of the Complaint.

The INA sections at issue were enacted on November 6, 1986. These sections provide that it is unlawful for a person to 1) knowingly hire an unauthorized alien for employment in the United States and 2) hire an individual without complying with the requirements of the Employment Verification System which requires employers to prepare, retain, and present for inspection an I-9 Form for each employee hired after November 6, 1986. Section

101(a)(3) of the IRCA which is generally referred to as the ``grandfather clause'', provides that sections 274(a)1)(A) and 274A(a)(1)(B) of the INA shall not apply to the hiring of an individual which occurred prior to enactment of the Act on November 6, 1986, and to the continuing employment of an alien who was hired prior to November 6, 1986.

It is the Respondent's position that the employee at issue, Feoamoeata Kapetaua (hereinafter referred to as ``Kapetaua''), was a grandfathered employee and therefore the Respondent was not subject to the requirements of the IRCA with regard to the hiring of Kapetaua. It is undisputed that the Respondent first hired Kapetaua prior to November 6, 1986, the date the IRCA was enacted. However, it is the Complainant's position that the employee, Kapetaua, quit the employment of the Respondent and therefore lost his grandfathered status. It is however, the Respondent's position that the employee, Kapetaua, did not quit the Respondent's employment and continued to be a grandfathered employee, exempt from the requirements of the IRCA. To determine whether the employee, Kapetaua, did indeed maintain his grandfathered status, it must be determined whether Kapetaua continued employment with the Respondent from prior to November 6, 1986 on.

Kapetaua first arrived in Hawaii in 1983 and soon thereafter began working for Respondent as a tree trimmer and agricultural worker (Tr. 122, 134-135). Lualeni Maka is the owner and operator of Respondent. Respondent provides ground maintenance, tree trimming, and yard service. In addition, Respondent operates a farm and piggery.

It is the Respondent's position that from prior to November 6, 1986 to approximately March 1988, Kapetaua worked as its employee on a continuing basis either in the ground maintenance, tree trimming, and yard service business or on the farm and piggery. Kapetaua testified that he worked for Respondent as a tree trimmer and agricultural worker. He further testified that from approximately Christmas 1986 to six months later in 1987, he did not work for Respondent as a tree trimmer. He subsequently returned to work with Respondent as a tree trimmer or ground maintenance man until December 1987, when he was hurt on the job (Tr. 134-136, 139, 142).

Sione Tukutau testified that he has been working for Respondent on the farm and piggery every weekend since January 1986. He further testified that since January 1986 through March 1988 he worked with Kapetaua at least twice a month on the farm and piggery (Tr. 420-423). The Complainant's witness, Vincent Haunga (hereinafter referred to as ``Haunga'') testified that Kapetaua

worked for him from approximately January or February 1988 on weekdays when Haunga had worked for Kapetaua. However, Haunga also testified that he did not see Kapetaua on the weekends and did not know if Kapetaua worked on the farm and piggery for Respondent (Tr. 583, 586-589).

Although the evidence does establish that the employee Kapetaua worked as a tree trimmer for employers other than Respondent after November 6, 1986, the evidence also indicates that Kapetaua continued to work on a continuous basis at Respondent's farm and piggery from November 1986 to March 1988, Therefore, although Kapetaua did not work for Respondent on a daily basis from November 1986 to March 1988, there was a regular pattern to his employment, including the employment at the farm and piggery.

The grandfather clause exemption to the IRCA does not specify that an employee loses his grandfathered status by being employed by more than one employer at the same time. However, if an employee quits or is terminated from employment, then grandfathered status is lost. Although Kapetaua testified that he quit Maka's as a tree trimmer, there is no evidence that he quit working on the farm or piggery from prior to November 6, 1986 to March 1988. Moreover, there is no evidence to indicate that the Respondent had actual notice that Kapetaua quit work as a tree trimmer. Kapetaua testified that he informed some members of Respondent's tree trimming crew that he quit work as a tree trimmer, however, he further testified that he never personally told Lualeni Maka, owner and operator of Respondent, that it was his intention to quit (Tr. 134, 135, 155).

In conclusion, the evidence establishes that Kapetaua was continuously employed by Respondent from prior to November 6, 1986 until approximately March 1988 as either a tree trimmer, grounds maintenance man, or agricultural worker. Therefore, Kapetaua did not lose his grandfathered status and sections 274A(a)(1)(A) and 274A(a)(1)(B) of the INA, which were enacted on November 6, 1986 do not apply to Respondent's employment of Kapetaua.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After careful consideration of the entire record, the Administrative Law Judge makes the following findings and conclusions:

1. The Respondent, Maka's Akamai Service aka Maka's Akamai Service, Inc. dba Akamai Yard Service Tree Trimmer, was charged by the Complainant, United States of America, with violations of the Immigration Reform and Control Act of 1986, specifically sec-

tions 274A(a)(1)(A) and 274A(a)(1)(B) of the Immigration and Nationality Act.

2. Service of the Complaint was proper and such Complaint incorporates the Notices of Inspection and Intent to Fine; therefore, proper notice was given to the Respondent through the service of the Complaint.

3. Feoamoeata Kapetaua was first hired by the Respondent prior to November 6, 1986, the date the IRCA was enacted.

4. Kapetaua worked for the Respondent as a tree trimmer, grounds maintenance man, and agricultural worker from prior to November 6, 1986 to approximately March 1988.

5. While he was working for Respondent, Kapetaua also worked for other employers.

6. Kapetaua informed other employees of the Respondent that he quit working for the Respondent as a tree trimmer, from approximately Christmas 1986 until six months later in 1987. However, he did not personally notify Lualeni Maka, Respondent's owner and operator, of his intention to quit work as a tree trimmer.

7. Kapetaua worked as an agricultural worker on the Respondent's farm and piggery on a continuous basis from prior to November 6, 1986 to approximately March 1988.

8. Although Kapetaua did not work for Respondent on a daily basis from prior to November 6, 1986 to approximately March 1988, there was a regular pattern to his employment with the Respondent, including his employment at the farm and piggery.

9. The grandfather clause exemption to the IRCA, as set forth in section 101(a)(3), applies to Kapetaua as Kapetaua did not lose his grandfathered status from November 6, 1986 until approximately March 1988.

10. As Kapetaua was a grandfathered employee, Respondent was not in violation of sections 274A(a)(1)(A) and 274A(a)(1)(B) of the Immigration and Nationality Act.

DECISION

It is the decision of the Administrative Law Judge that the Respondent, Maka's Akamai Service aka Maka's Akamai Service, Inc. dba Akamai Yard Service Tree Trimmer, was not in violation of the Immigration Reform and Control Act of 1986, specifically sections 274A(a)(1)(A) and 274A(a)(1)(B) of the Immigration and Nationality Act as charged by the Complainant, United States of America.

SO ORDERED.

Dated: November 15, 1988

HENRY M. TAI
Administrative Law Judge, Honolulu, Hawaii Hearing Office

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER
ADMINISTRATIVE REVIEW AND FINAL AGENCY ORDER VACATING THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER
FINAL AGENCY ORDER NO. 11

United States of America, Complainant v. Maka's Akamai Service, a/k/a/ Maka's Akamai Service Inc. d/b/a/ Akamai Yard Service Tree Trimmer, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100015.

Vacation by the Chief Administrative Hearing Officer of the Administrative Law Judge's Decison and Order

The Honorable Henry M. Tai, the Administrative Law Judge assigned to this case by the Chief Administrative Hearing Officer, issued an Order regarding the above-styled proceeding on November 15, 1988. The Order was issued on this matter subsequent to an administrative hearing held in Honolulu, Hawaii, commencing on July 12, 1988, and concluding on July 15, 1988.

Pursuant to Title 8, United States Code, Section 1324a(e)(6) and Section 68.52 of the applicable rules of practice and procedure, appearing at 52 Fed. Reg. 44972-85 (1987) [hereinafter Rules] (to be codified at 28 CFR Part 68), the Chief Administrative Hearing Officer, upon review of the Administrative Law Judge's Order, and in accordance with Section 68.52 of the Rules, supra, vacates the Administrative Law Judge's Order.

On February 23, 1988, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the Service) filed a Complaint against the respondent, Maka's Akamai Service, a/k/a/ Maka's Akamai Service, Inc. d/b/a/ Akamai Yard Service Tree Trimmer (hereinafter Maka's). The Service charged the respondent with violations of the Immigration Reform and Control Act of 1986 (hereinafter IRCA). On July 11, 1988, the Service filed an Amendment to its Complaint setting forth the specific alleged violations by the respondent.

Count One alleges that the respondent knowingly hired Feao Moeata Kapetaua (hereinafter Kapetaua) for employment in the United States.

(a) The respondent hired Kapetaua after November 6, 1986.

(b) Kapetaua was an alien, not at the time the respondent hired him, authorized for employment in the United States.

(c) Respondent hired Kapetaua knowing that he was not authorized for employment in the United States.

Accordingly, the complainant charged that the respondent was in violation of Section 274A(a)(1)(A) of the Immigration and Nationality Act (hereinafter the INA), 8 U.S.C. 1324a(a)(1)(A), which renders it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States. In its Notice of Intent to Fine, which was made a part of, and incorporated into, the Complaint, the complainant assessed a civil monetary penalty against the respondent for the alleged violation set out in Count One in the amount of $2,000.00. The complainant also requested in its Complaint, that a cease and desist order be issued against the respondent for continuing violations set out in Count One.

Count Two alleges that the respondent hired Kapetaua for employment in the United States.

(a) The respondent hired Kapetaua after November 6, 1986.

(b) The respondent failed to prepare an employment eligibility verification form (I-9) for Kapetaua.

Accordingly, the complainant charged that the respondent was in violation of Section 274A(a)(1)(B) of the INA, 8 U.S.C. 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States, an individual without complying with the requirements of Section 274A(a) (1) and (2) of the INA, 8 U.S.C. 1342a(a) (1) and (2) and 8 CFR 274a.2(b)(1) (i) and (ii). In its Notice of Intent to Fine, which is incorporated into and made a part of the Complaint, the complainant assessed a civil monetary penalty against the respondent in the amount of $1,000.00 for the alleged violations in Count Two.

On May 2, 1988, the respondent, by and through its attorney, answered the above styled complaint and specifically denied the allegations set out therein.

After due notice was given to the parties, an administrative hearing was held on this matter. The hearing was presided over by The Honorable Henry M. Tai, Administrative Law Judge. The Administrative Law Judge issued a decision and order on November 15, 1988. In the findings of fact and conclusion of law in the Order, the Administrative Law Judge held that the employee, Kapetaua, was a grandfathered employee and therefore respondent was not in violation of Sections 274A(a)(1)(A) and 274A(a)(1)(B) of the INA. The decision held that the respondent, Maka's, was not in

violation of Sections 274A(a)(1)(A) and 274A(a)(1)(B) of the INA, as charged by the complainant, the United States of America.

The Chief Administrative Hearing Officer has conducted an administrative review on this proceeding and orders the following:

1. The attached memorandum is incorporated into and made a part of this Order.

2. The Administrative Law Judge's Decision and Order dated November 15, 1988, is hereby vacated.

3. The Complaint, together with exhibits, including the Notice of Intent to Fine and Notices of Inspection, were properly served on the respondent.

4. The preponderance of the evidence during this proceeding, including the testimony elicited from the witnesses during the hearing indicates that Kapetaua, the employee at issue, quit the respondent, Maka's sometime in December of 1986, went to work for another employer, and was rehired by the respondent sometime in the Summer of 1987. Accordingly, it is held that the respondent was in violation of Section 274A(a)(1)(A) of the INA, 8 U.S.C. 1324a(a)(1)(A), which renders it unlawful, after November 6, 1986, for a person or other entity to hire, for employment in the United States, an alien knowing the alien is authorized for employment in the United States. It is ordered that the respondent cease and desist from the violations of the above quoted sections and that respondent pay over to the Service the amount of $2,000.00, which was originally assessed in the complainant's Notice of Intent to Fine.

5. The preponderance of the evidence indicates that the respondent hired Kapetaua sometime in the Summer of 1987, knowing that the employee was not authorized to work in the United States. The respondent failed to comply with the requirements of the employment eligibility verification system, by failure to complete the required Form I-9, in violation of Section 274A(a)(1)(B) of the INA, 8 U.S.C. 1324a(a)(1)(b), which renders it unlawful, after November 6, 1986, for a person or other entity, to hire, for employment in the United States an individual without complying with the requirements of Sections 274A(b) (1) and (2) of the INA, 8 U.S.C. 1324a(b) (1) and (2). It is ordered that the respondent pay over to the Service the amount of $1,000.00, which was originally assessed in the complainant's Notice of Intent to Fine.

SO ORDERED:

Date: December 15, 1988

RONALD J. VINCOLI
Acting Chief, Administrative Hearing Officer

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

United States of America, Complainant, v. Maka's Akamai Service a/k/a Maka's Akamai Service, Inc. d/b/a Akamai Yard Service Tree Trimmer, Respondent; 8 U.S.C. 1324a Proceeding; Case No. 88100015.

MEMORANDUM OF LAW IN SUPPORT OF FINAL AGENCY ORDER No. 11, BY THE CHIEF ADMINISTRATIVE HEARING OFFICER

I. SYNOPSIS OF PROCEEDING

On February 23, 1988, the United States of America, by and through its agency, the Immigration and Naturalization Service (hereinafter the Service), filed a Complaint with the Office of the Chief Administrative Hearing Officer. The Service charged Respondent, Maka's Akamai Service a/k/a Maka's Akamai Service, Inc. d/b/a Akamai Yard Service Tree Trimmer (hereinafter Maka's), with violations of the Immigration Reform and Control Act of 1986 (hereinafter IRCA). Specifically, the Service alleged that respondent violated Sections 274A(a)(1)(A) and (a)(2)(B) of the Immigration and Nationality Act (hereinafter the INA), by knowingly hiring an unauthorized alien and by failing to comply with employment verification requirements set forth in Section 274A(a)(2)(B). 8 U.S.C. 1324a(a)(1)(A) and (a)(2)(B).

On May 2, 1988, the respondent, through its counsel, filed an Answer to the Complaint and denied the alleged violations of IRCA set forth therein. The respondent also asserted that the service of the Notices of Inspection and the Notice of Intent to Fine, were defective and therefore void.

On March 3, 1988, the Chief Administrative Hearing Officer assigned this matter to The Honorable Henry M. Tai, Administrative Law Judge in Honolulu, Hawaii. After due notice to both parties, a hearing commenced on July 12, 1988, in Honolulu.

II. COMPLAINANT'S CONTENTIONS

The Service alleges that the respondent, Maka's violated sections of IRCA by knowingly hiring an alien, after November 6, 1986, who was unauthorized to work in the United States, and for failure to comply with employment verification requirements.

The Service maintains that the employee at issue in this matter, Feao Moetea Kapetaua (hereinafter Kapetaua), was a ``new hire'' in violation of IRCA because he had quit his job with Maka's sometime in December 1986. Thus, Kapetaua was ineligible for grandfathered status under 8 U.S.C. 1324a(a)(7)(B).

The Service requested that the Administrative Law Judge issue an order directing that the respondent cease and desist from the violations and pay a $5,000 civil money penalty (the Service reduced the amount by amendment to the sum of $3,000).

III. RESPONDENT'S CONTENTIONS

Respondent argues, first, that the defective service of the Notices of Inspection renders the subsequent citation void. Secondly, respondent maintains that Kapetaua was exempt from IRCA because he had been hired before the date of the enactment of IRCA, and that he had been employed continuously by Maka's. Respondent contends that temporary leaves of absence taken by Kapetaua were with the employer's consent and did not disrupt Kapetaua's continued employment with Maka's. Thus, respondent contends that Kapetaua is a grandfathered employee.

IV. THE ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

The Administrative Law Judge issued his decision and order on November 15, 1988, (hereinafter the Decision) after a full hearing. The judge concluded that Maka's was not in violation of IRCA as charged by the Service.

In his summary and evaluation of the evidence, the Administrative Law Judge found that the service of the Complaint was proper and that since the Notices of Inspection and the Notice of Intent to Fine were incorporated in the Complaint, proper notice was given to the respondent through the service of the Complaint. On the issue of whether Kapetaua was a ``new hire'' or a grandfathered employee, the Judge found that the evidence established that Kapetaua was employed by employers other than the respondent after November 6, 1986. However, the Judge noted that the evidence also indicated that Kapetaua continued to work [on a continuous basis] at respondent's farm and piggery from November 1986 to March 1988. Although the Administrative Law Judge noted that Kapetaua

testified that he had ``quit'' Maka's as a tree trimmer, he found that there was ``no evidence that he quit working on the farm or piggery from prior to November 6, 1986, to March 1988.'' Decision at 3-4. The judge noted that the employer had no ``actual notice'' of Kapetaua's quitting work as a tree trimmer. Id. Kapetaua testified that he told some members of Maka's tree trimming crew that he quit but never personally told Lualeni Maka, the owner and operator of respondent, that he intended to quit. Id.

In conclusion, Judge Tai found that the evidence established that ``Kapetaua was continuously employed by respondent from prior to November 6, 1986, until approximately March 1988, as either a tree trimmer, ground maintenance man, or agricultural worker.'' Decision at 4. Accordingly, the Administrative Law Judge found that Kapetaua retained his grandfathered status and Sections 1324a (a)(1)(A) and (a)(1)(B) are not applicable to respondent's employment of Kapetaua.

On November 21, 1988, the Service filed a request for an administrative review of the Administrative Law Judge's decision and order pursuant to Section 274A(e)(6) of the INA, 8 U.S.C. 1324a(e)(6), and 28 C.F.R. 68.52.

V. REVIEW AUTHORITY OF THE OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

Section 274A(e)(6) of the INA provides that:

> Administrative Appellate Review--The decision and order of an administrative law judge shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order under this subsection. Attorney General may not delegate the Attorney General's authority under this paragraph to any entity which has review authority over immigration-related matters.

Section 68.52 of 28 C.F.R. provides that:

> Within thirty (30) days from the date of decision, the Chief Administrative Hearing Officer may issue an order which adopts, affirms, modifies or vacates the Administrative Law Judge's order.
>
> (1) If the Chief Administrative Hearing Officer issues no order, the Administrative Law Judge's Order becomes the final order of the Attorney General. If the Chief Administrative Hearing Officer modifies or vacates the order, the order of the Chief Administrative Hearing Officer becomes the final order.

The scope of administrative review of the Chief Administrative Hearing Officer of final orders and decisions of Administrative Law Judges is set forth in the Administrative Procedure Act.[1] Title 5,

[1]Section 274A(e)(3) provides that ``[t]he hearing shall be conducted in accordance with the requirements of Section 554 of Title 5, United States Code.''

United States Code, Section 557 provides that in reviewing the initial decision, the agency has all the powers which it would have in making the initial decision. The agency is not compelled to defer to the findings of the Administrative Law Judge. The Supreme Court in Federal Communications Commission v. Allentown Broadcasting Corp., held that ``an agency is not limited to appellate power, thus findings below may be reversed even if they are not clearly erroneous.'' 349 U.S. 358 (1955).

VI. FINDINGS AND CONCLUSION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER AFTER AN ADMINISTRATIVE REVIEW, PURSUANT TO SECTION 274A(e)(6) OF THE INA AND 28 C.F.R. 68.52

The Chief Administrative Hearing Officer has conducted a review of the Administrative Law Judge's Decision. The documents identified in the record as exhibits, the testimony elicited during the hearing, and arguments presented by counsel, as contained in the record, have been carefully considered, and the Chief Administrative Hearing Officer finds the following:

(1) The Service's Complaint with supporting documents including Notices of Inspection and a Notice of Intent to Fine was filed in this Office on February 23, 1988, and was properly served on the respondent on March 4, 1988. On July 11, 1988, the Service filed an amendment to its Complaint.

(2) In the section entitled Summary and Evaluation of the Evidence of the Order, the Administrative Law Judge found that the respondent first hired Kapetaua prior to November 6, 1986, which is the day of the enactment of the IRCA. The judge determined that, although Kapetaua worked as a tree trimmer for employers other than the respondent after November 6, 1986, he, nevertheless, continued to work for the respondent during that time period. The judge stated that ``the evidence indicated Kapetaua continued to work on a continuous basis at respondent's farm and piggery from November 1986 to March 1988.'' Decision at 3. He stated that Kapetaua testified that he quit working for Maka's as a tree trimmer, but concluded that there was no evidence that Kapetaua quit working on the farm or piggery from prior to November 6, 1986, and until March 1988. Id. He also stated in the opinion that there was no evidence to indicate that the respondent had actual notice that Kapetaua quit work as a tree trimmer. Decision at 4. However, the judge noted that Kapetaua testified that he informed members of the respondent's tree trimming crew that he quit work as a tree trimmer. The judge concluded that the employee, Kapetaua,

did not lose his grandfathered status and that Sections 274a(a)(1)(A) and (a)(2)(B) of the INA did not apply.

There are ten separate counts in the findings of fact and conclusions of law in the order. Essentially, the order holds that Kapetaua was a grandfathered employee and the respondent was not in violation of Sections 274a (a)(1)(A) and (a)(2)(B) of IRCA. After reviewing the record of the proceeding, the Chief Administrative Hearing Officer vacated the Administrative Law Judge's order of November 15, 1988.

Discussion

Section 274A(a)(3) provides the following:

GRANDFATHER FOR CURRENT EMPLOYEES

(A) Section 274A(a)(1) of the Immigration and Nationality Act shall not apply to the hiring, recruiting or referring of an individual for employment which has occurred before the date of the enactment of this Act. Section 274A(a)(2) of the Immigration and Nationality Act shall not apply to the continuing employment of an alien who was hired before the date of the enactment of the Act.

8 U.S.C. 1324a(a)(3).

The regulation at 8 C.F.R. 274a.7(b), sets forth a test for determining whether an employee has lost ``grandfather'' status. If the employee ``quits'' his employment, ``grandfather'' status is forfeited. Section 274a.7 of 8 C.F.R. provides in pertinent part that:

(a) The penalties provisions as set forth in 8 C.F.R. 274A(e) and (f) of the Act . . . shall not apply to the continuing employment of an employee who was hired prior to November 7, 1986. For purposes of this section continuing employment is defined in 8 C.F.R. 274a.2(b)(1)(viii) of this part.

(b) [A]n employee who was hired prior to November 7, 1986 shall lose his or her pre-enactment status if the employee:

(1) Quits; or

(2) Is terminated by the employer . . . or;

(3) is excluded or deported . . . or departs the United States under a grant of voluntary departure.

For the reasons stated below, the Chief Administrative Hearing Officer finds that Kapetaua was not a ``grandfathered'' employee. Kapetaua's ``grandfathered'' employee status was forfeited when he ``quit'' working for Maka's and went to work for Isi. Thus, the Administrative Law Judge erroneously concluded that Maka's was not

in violation of Sections 274A(a)(1)(A) and (a)(2)(B) of the INA. 8 U.S.C. 1324a(a)(1)(A) and (a)(2)(B).

The Administrative Law Judge held that Kapetaua worked for Maka's as a tree trimmer, grounds maintenance man, and agricultural worker from prior to November 6, 1986, to approximately March 1988. The judge stated that there ``is no evidence that [Kapetaua] quit working on the farm or piggery from prior to November 6, 1986, to March 1988.'' Decision at 4. The judge's conclusion is not supported by the record. Rather, the record clearly establishes that Kapetaua quit working for Maka as a tree trimmer and quit working on Maka's farm. [2] Transcript (hereinafter Tr.) at 35-36, 192, 572, 573; Kapetaua's deposition (hereinafter depo.) at 41. For example, in response to questioning, Kapetaua stated that he quit working on Maka's farm. Tr. at 130.

Q: When you were working for Isi, did you quit working on the farm?

A: Yes. I quit the farm.

Id.

The record also establishes that Kapetaua worked on a full-time basis for another Tongan employer, Isi, after he quit working for Maka's.[3] Tr. at 136. Kapetaua stated that during the time he worked for Isi he only worked for Isi. Tr. at 143, 148-49. He further stated that he ``only get pay from Isi.'' Id.; Kapetaua depo. at 21.

In an attempt to rebut Kapetaua's testimony that he quit working for Maka as both a tree trimmer and an agricultural worker on Maka's five acre farm, Maka proffered the testimony of Sione Tukatau. Tr. at 424. Mr. Tukutau stated that he took care of Maka's farm every weekend. Tr. at 419. He stated that Kapetaua had worked on Maka's farm at least twice a month since January 1986. Tr. at 420, 423.

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[2]While the record is clear regarding the fact that Kapetaua quit working for Maka's, the date he quit and the date he was rehired by Maka's are not clearly established in the record. The record, however, does indicate that Kapetaua quit Maka's sometime in December of 1986 (Tr. at 482-84, 572, 574), and was rehired by Maka's sometime after June of 1987. Tr. at 484. The dispositive issue regarding Kapetaua's ``grandfathered'' status is whether he ``quit'' Maka's within the meaning of the regulation some time after November 6, 1986. The evidence indicates that he did ``quit'' Maka's after such date, therefore, the exact date on which he quit is not critical.

[3]In Marlin-Rockwell Corporation v.N.L.R.B., 116 F.2d 586, 588 (2d Cir. 1941), the Court held that two workers the employer had laid off obtained equivalent jobs with other employers for whom they were working at the time of the election, therefore they should be considered as having ``quit'' the service of the company.

The judge placed undue weight on Mr. Tukutau's testimony in reaching his conclusion that Kapetaua continued to work at Maka's farm and piggery from November 1986 to March 1988. Moreover, the judge simply ignored Kapetaua's testimony that he quit working on Maka's farm. Even if Kapetaua did work on Maka's farm during the critical time period, the record does not indicate that Kapetaua received wages or other remuneration for working on the farm. At no time during the proceeding did Maka submit any evidence indicating that Kapetaua was paid for working on the farm during the period of time from December 1986 to the Summer of 1987.

The tenuous employment relationship that Maka attempted to establish by Mr. Tukutau's testimony that Kapetaua worked at the farm and piggery at least twice a month from 1986 to 1988, is refuted by Maka's own testimony. Maka's testimony indicates that the farm was a place where Tongans could fraternize rather than a business enterprise. For example, in response to questioning on whether his employees socialized together after work, Maka stated:

A: But mostly they drink in the farm.

Q: So in 1986 and 1987 . . . can you tell the Court about how often the crew would go to the farm?

A: It's more than three times a week.

Q: So the Tongans were kind of a close group, and they wanted to go to the farm, beer or no beer, right?

A: Right, Because in my farm is mostly 99 percent Tongan life.

Tr. at 264-66.

In further response to questioning regarding the period when Kapetaua was not working for Maka's, Maka revealed that: ``I cannot counting the farm. Because that's not job.'' Tr. at 292. Maka noted that Kapetaua still came to the farm during the time he worked for Isi. he stated that ``[M]y boys, they choke [Kapetaua], tell him ``Hey, you buy beer, because Isi pay you.'' Tr. at 293.

Maka's contention that he and Kapetaua maintained a continuous employment relationship from November 6, 1986, until 1988, is further refuted by respondent's letter of October 30, 1987, to the Service wherein he failed to mention Kapetaua when listing ``all'' employees who had worked for Maka's since November 6, 1986. Exhibit C-10. When questioned during his June 16, 1988, deposition regarding this omission, Maka stated that he did not include Kapetaua's name on the list ``[b]ecause he only work about couple times and stay home for take care the kids . . . .'' Maka's depo. at 42. Moreover, the record is bereft of any employment records that

could lend credence to Maka's claim that Kapetaua was an employee of Maka's from November 6, 1986, until 1988. [4]

The record indicates that Kapetaua and Maka may have maintained a social relationship, which at times was more akin to a familial relationship, from November 6, 1986, until 1988. The record simply does not support Maka's contention that Kapetaua and Maka maintained an employment relationship from November 6, 1986, to October 1987.

Although Maka concedes that Kapetaua went to work for Isi, he does not believe that Kapetaua quit working for Maka's. Tr. at 321. Rather, Maka contends that he ``loaned'' Kapetaua to Isi and consequently Kapetaua was still employed by Maka's. Tr. at 292. Maka asserts that he also ``loaned'' Kapetaua to other Tongan employers, including his brother-in-law, Vincent Haunga who is Kapetaua's present employer. Tr. at 352. There is no specific corroboration of Maka's contention that he ``loaned'' Kapetaua to Isi or Haunga. On the contrary, Kapetaua testified that such an arrangement did not exist:

Q: Did you ask Maka's permission first before you went to work for Isi?

A: No, I just went by myself.

Q: Did Isi ever tell you that Isi himself had to ask permission from Maka before Isi let our work for him?

A: No.

Q: How long did you work for Isi?

A: It was six months. But not up to a year.

Q: Did you work full-time or part-time for Isi?

A: Full-time.

Tr. at 573.

Mr. Haunga's testimony also refutes Maka's contention that Kapetaua's employment by other Tongan employers was pursuant to a ``borrowed employee'' agreement:

Q: Before the first day [Kapetaua] came and worked for you, before that did you have to get any kind of permission or okay from Maka, or did you just hire him?

A: I just hired him.

Q: Did he come to you, or how did you hire him?

A: Yeah. He came to me.

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[4]Maka proffered employment records indicating that Kapetaua was employed by Maka's prior to November 6, 1986, but he failed to produce such records for the period of time from December 1986 to Summer of 1987.

Q: So at the time when he came and said he needed a job real bad, did you already have an agreement with Mr. Maka that you would take on [Kapetaua] or anything like that?

A: No.

Tr. at 585.

The Chief Administrative Hearing Officer rejects Maka's contention that he ``loaned'' Kapetaua to Isi. In Dugas v. Pelican Construction Company, 481 F.2d 773, 778 (5th Cir. 1973), the Fifth Circuit stated that ``essential to the [borrowed employee] relationship is some type of agreement, written or verbal, formal or informal, between the general employer and the temporary employer evidencing an intention to create that relationship.'' Maka's contention that an agreement existed with regard to Kapetaua's employment with Isi is not supported by the record. Even if Maka entered into such an agreement with Isi, there is no evidence that Kapetaua consented to such an arrangement. See Standard Oil v. Anderson, 212 U.S. 215 (1909). Moreover, the record is devoid of evidence that Maka had any right to control Kapetaua during his employment with Isi. See Gaudet v. Exxon Corporation, 562 F.2d 351 (5th Cir. 1977); Afonso v. City of Boston, 587 F. Supp. 1342 (D. Mass. 1984). Nor is there any definitive evidence that Kapetaua received wages or other remuneration from Maka during the time he worked for Isi. Accordingly, the Chief Administrative Hearing Officer concludes that Kapetaua was not ``loaned'' to Isi, but that he ``quit'' working for Maka and went to work for Isi.

It is well-settled that the test of a employer-employee relationship is the existence of the right to control the employee's actions. Holt v. Winpisinger, 811 F.2d 1532 (D.C. Cir. 1987); Restatement (Second) of Agency Section 270(1) (1958) (defining employee as ``a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the control or right to control). Fundamental to such a relationship is that it may be terminated at the will of either party. Stancil v. Mergenthaler Linotype Company, 589 F. Supp. 78 (D. Hawaii 1984). In the instant case, the record reveals that Maka did not have the right to control Kapetaua during the time he worked for Isi. Additionally, the record repeatedly reveals that Kapetaua exercised his right to terminate his employment relationship with Maka. Such a relationship is not continued by Maka's notions that no Tongan employees ever ``quit'' his company, and that such employees continue to be his employees even when they are employed by a subsequent employer. Tr. at 286, 526, 527.

The Administrative Law Judge found that Kapetaua informed employees of Maka's that he quit working for Maka as a tree trimmer. Decision at 4. The judge, however, determined that Kapetaua did not personally notify Maka of his intention to quit work as a tree trimmer.[5] This finding is clearly erroneous. There is no requirement in the relevant statutory provisions or regulations that an employer receive ``actual'' notice that an employee ``quit.'' Moreover, it is evident that Mr. Maka knew that Kapetaua had ``quit'' in December 1986, because when the Aliamanu job came in the Summer of 1987, Maka only had one coconut tree ``climber'' and was forced to go personally to Kapetaua's house and ask him to come back to work for Maka's. Tr. at 138, 192; Kapetaua depo. at 41.

The evidence in this proceeding clearly establishes that Kapetaua ``quit'' working for Maka's sometime in December 1986, and thereby terminated his employment relationship with the respondent. Thus, Kapetaua forfeited his ``grandfathered employee status'' under Section 274A(a)(3). 8 U.S.C. 1324a(a)(3). Accordingly, the respondent violated Sections 274A(a)(l)(a) and (a)(l)(B) of the INA when he rehired Kapetaua in the Summer of 1987 knowing that he was an alien unauthorized for employment in the United States.

[5]The evidence, however, indicates that Maka did have constructive notice that Kapetaua quit working for Maka's because Kapetaua told the crew he was working with that he quit Maka's. Tr. at 135-36.