

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

United States of America, Complainant v. John Gasper, Individually and d/b/a John Gasper Labor Contractor, Respondent; 8 USC 1324a Proceeding; OCAHO Case No. 89100567.

Appearances: **WILLIAM LEE ABBOTT**, Esq., El Paso, TX for the Complainant, the Immigration & Naturalization Service (INS).
CARLOS K. OGDEN, Esq., (John F. Schaber, P.A.), Deming, NM, for the Respondent, John Gasper, Individually and d/b/a John Gasper Labor Contractor (Gasper).

Before: **RICHARD J. LINTON**, Administrative Law Judge

**RULING IN LIMINE: RESPONDENT HAS BURDEN TO PROVE GRANDFATHER STATUS;
INS HAS BURDEN TO SHOW FORFEITURE**

Pursuant to the Immigration Reform and Control Act of 1986 (IRCA),¹ on November 6, 1989 Complainant, the Immigration and Naturalization Service (INS), filed a complaint in this case against John Gasper, individually and d/b/a John Gasper Labor Contractor (Gasper), the Respondent. The Notice of Hearing issued November 9, 1989. By his answer, filed December 11, 1989, Gasper denies the alleged violations of IRCA.

IRCA requires employers, on hiring workers, to verify that the persons hired are authorized to work in the United States. 8 USC 1324a(a)(1)(B) and 1324a(b). Verification is recorded on an INS form (for each individual) designated as, and commonly known as, an ``I-9.' 8 CFR 274a.2. To prove that an employer has violated the verification requirements, the INS must establish five facts: (1) that

¹For statutory background, see Mester Mfg. Co. v. INS, 879 F.2d 561 (9th Cir. 1989).

a person or other entity (the employer) has (2) hired, (3) for employment in the United States, (4) an individual, (5) without complying with the verification requirements.²

A ``grandfather'' provision in IRCA exempts employers from the verification requirements for employees hired before IRCA's November 6, 1986 effective date.³Maka's Akami Service v. INS, 904 F.2d 1351 (9th Cir. 1990).

Alleging verification (paperwork) violations concerning 156 named individuals, the INS seeks an order imposing civil money penalties on Gasper in the sum of \$70,500 under 8 USC 1324a(e)(5). Under the statutory provision civil penalties may be imposed, for first violations of the paperwork requirements, ranging from \$100 to \$1000 for each individual.

The question which has arisen here, concerning a substantial number of Gasper's workers, is which party has the burden of establishing preenactment (grandfather) status.

In his short brief of June 11, 1990, Gasper contends that once a respondent employer raises preenactment status as an issue, the burden shifts to the INS ``to prove a violation.'' Of course, the INS always carries the burden of proving a violation. The question is whether grandfather status is an affirmative defense. In its June 8, 1990 brief, and its July 12 supplemental brief, the INS contends that its burden is to prove the elements of a verification violation,⁴ and argues that the party who seeks to rely on the grandfather exemption has the burden of raising and proving that status. Neither the statute nor the legislative history addresses the question of who carries the burden of proving grandfather status. For the reasons and authorities which follow, I agree with the INS.

The well-settled general rule is that the party claiming exemption under a grandfather provision has the affirmative burden of raising and proving the facts establishing application of the exemption. U.S. v. First City National Bank, 386 U.S. 361, 87 S.Ct. 1088, 1092 (1967). FTC v. Morton Salt Co., 334 U.S. 37, 68 S.Ct. 822, 827 (1948). It is an affirmative defense⁵ which is strictly construed against the party who claims it.⁶ The principle has been applied in a variety of situations, including labor law (the Equal Pay Act),⁷

²Involving mere ``paperwork'' requirements, verification violations differ from the ``knowing'' hire of unauthorized aliens which IRCA prohibits.

³ Public Law No. 99-603, 100 Stat. 3359, 3372, Section 101(a)(3), ``Grandfather For Current Employees;'' 8 USC 1324a(n)(4)(D), note.

⁴Such elements being the five specified earlier.

⁵Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 2229 (1974).

⁶Corning Glass, id.

⁷ Corning Glass, id.

securities law,⁸the Federal Food, Drug and Cosmetic Act,⁹and criminal law.¹⁰Under IRCA itself the recent Maka's ¹¹decision carries the implicit suggestion that the party claiming IRCA's grandfather exemption has the burden of proving its application. Normally, the party claiming the benefit of IRCA's grandfather exemption will be the respondent employer.

The parties here fail to address the secondary question who has the burden of proving forfeiture in verification cases? For paperwork cases, it appears that a respondent employer establishes grandfather status once he proves that the individual in question was hired before November 6, 1986. (The regulations use the date of November 7, 1986. 8 USC 274a.7.) This flows from the fact that the grandfather provision does not link the verification requirement to the separate concept of ``continuing employment'' found in 8 USC 1324a(a)(2), a ``knowing'' violation provision. In any event, the regulations, 8 CFR 274a.7(b), provide for forfeiture:

(b) For purposes of this section, an 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; the term termination shall include, but is not limited to, situations in which an employee is subject to seasonal employment; or
- (3) Is excluded or deported from the United States or departs the United States under a grant of voluntary departure.

The ``shall lose'' language, with the three forfeiture events, is written as a rebuttal of a showing of grandfather status. Thus, once a respondent employer establishes grandfather status, the burden shifts to the INS to show forfeiture under 8 CFR 274a.7(b). I read Maka's as being consistent with this interpretation. As the parties did not brief the forfeiture aspect, I make this portion of my ruling without prejudice to further consideration should the parties file supplemental briefs within 30 days of this ruling.

ACCORDINGLY, on this in limine issue, I RULE that the party claiming the existence of preenactment (grandfather) status, Respondent Gasper in this case, has the burden of proving grandfa-

⁸Rheem Mfg. Co. v. Rheem, 295 F.2d 473, 475, 477 (9th Cir. 1961).

⁹U.S. v. Articles of Drug: 5,906 Boxes, 745 F.2d 105, 113 (1st Cir. 1984); U.S. v. An Article of Device, 731 F.2d 1253, 1262 (9th Cir. 1984); U.S. v. An Art. of Drug ``Bentex Ulcerine'', 469 F.2d 875, 878 (5th Cir. 1972); U.S. v. Allan Drug Corp., 357 F.2d 713, 718 (10th Cir. 1966).

¹⁰U.S. v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir. 1981).

¹¹Maka's Akami Service v. INS, 904 F.2d 1351 (9th Cir. 1990), affirming the December 15, 1988 order of the Chief Administrative Hearing Officer (CAHO) vacating the decision of the ALJ in OCAHO Case No. 88100015.

ther status. Once Gasper establishes grandfather status as to an individual, the burden of proving forfeiture shifts to the INS.

SO ORDERED: At Atlanta, Georgia this August 15, 1990.

RICHARD J. LINTON
Administrative Law Judge