



Date: FEB 11 1991

Case No: 89-INA-316

In the Matter of:

JEFFREY SANDLER, M.D.,  
Employer

on behalf of

KAREN RAMDASS,  
Alien

Before: Brenner, Glennon, Groner, Guill, Lipson,  
Litt, Romano, Silverman and Williams  
Administrative Law Judges

JAMES GUILL  
Associate Chief Judge

### DECISION AND ORDER

This matter arises from a request for administrative-judicial review of a denial of labor certification under section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14), and Title 20, Part 656 of the Code of Federal Regulations.

#### Background

On November 2, 1987, Employer, Jeffrey Sandler, M.D., filed an application for labor certification on behalf of the Alien for the position of live-in housekeeper (AF 40). The job duties were: "Cleaning, laundry, ironing, wash dishes, cooking, serving, general housekeeping and child care" (AF 40 at item 13). The only job requirement listed was three months of experience (AF 40 at item 14).

On December 15, 1988, the Certifying Officer issued a Notice of Findings proposing to deny certification on the ground that a U.S. applicant had been referred to Employer, but Employer had failed to provide the results of this referral as prescribed in 20 C.F.R. §§656.21(j)(1) and 656.21(b)(7) (AF 9-10).

In rebuttal, Employer's counsel referred to a November 16, 1988 letter in which he had stated that the applicant "was not qualified for the position because she lacked 3 months

employment experience and stated that she was a smoker" (AF 8, 12, 14). Counsel added that the fact that the applicant was a smoker "is unacceptable due to the fact that the job involves taking care of two minor children of the employer" (AF 8).

The CO issued her Final Determination denying certification on April 28, 1989. The ground for the denial was that Employer had failed to document that he had rejected the U.S. worker for lawful, job-related reasons. First, the CO noted that the applicant's experience profile revealed that she had six months of experience as a housekeeper, and secondly, the CO found that the applicant's smoking habit could not be considered because neither the application nor the advertisement specified non-smoking as a job requirement (AF 6-7).

Employer timely requested administrative-judicial review, and on July 13, 1990, a panel of the Board of Alien Labor Certification Appeals (the Board) issued its Decision and Order affirming the CO's denial of labor certification. On September 5, 1990, the Board vacated the panel decision, and granted en banc review. Amicus curiae briefs were invited from the American Immigration Lawyers Association and from the AFL-CIO.

## Discussion

Generally, an employer's rejection of a U.S. applicant where the applicant meets the stated minimum requirements, but fails to meet requirements not stated in the labor certification application or the advertisements, is deemed unlawful. ChromatoChem, 88-INA-8 (Jan. 12, 1989) (en banc). The rejection in this matter, however, is distinguishable from those where the applicant is rejected because of his or her inability to perform the job requirements due to a lack of education or skills or training or experience. This rejection raises the issue of whether an employer may reject an applicant for reasons of personal characteristics believed harmful to the purpose of the employment where the employer failed to specify such restriction in its application and attendant advertisements.

### I

The practicality of enumerating peripheral job restrictions in the application and the advertisements must be considered on a case-by-case basis. We believe that where a U.S. applicant engages in personal practices which, if performed on the job would expose the employee, or the employee's charge, or co-workers, or the employer or the employer's family or property to a risk that would not otherwise exist, the employer has an inherent right to prohibit such practice, provided that the job requirements do not unlawfully or unreasonably discriminate.

### II

If an employer, as in this case, introduces a previously unstated requirement as a ground for rejection of a U.S. applicant, such is properly considered a job requirement that must be considered under the provisions of §656.21(b)(2). Thus, the requirement must be documented as not unduly restrictive, §656.21(b)(2)(i), and if not normally required for the job in the United

States or defined for the job in the Dictionary of Occupational Titles, must be documented as arising from business necessity, §656.21(b)(2)(i)(A) and (B).

### III

Given Employer's reasonable concerns regarding the possible harmful effects of secondary cigarette smoke exposure and the job requirement of caring for small children who are unable to remove themselves from such exposure, we find Employer's rejection of the U.S. applicant was not unlawful even though Employer did not advertise that cigarette smoking on the premise would not be tolerated.<sup>1</sup>

We emphasize that this finding is not inseparable from our finding that the evidence herein does not suggest that Employer concocted a reason for rejection so as to ensure the hiring of the Alien. Where, however, a Certifying Officer suspects that physical or character requirements were invented merely as a means of eliminating a qualified U.S. applicant, an employer may be required to document the reasonableness of the unadvertised requirement on a more objective, detailed basis. Employers seeking labor certification are charged with a general requirement of good faith in recruitment, H.C. LaMarche Enterprises, Inc., 87-INA-607 (Oct. 27, 1988), and must be cognizant that the late introduction of new job requirements may, in many instances, be viewed as evidence of a lack of good faith. Thus Employers introducing new requirements based on an applicant's personal characteristics must be prepared to overcome the impression that the new requirement is a post hoc attempt to eliminate a qualified U.S. applicant from consideration for the job.

The holding herein is not expandable so as to excuse the failure of an employer to state job requirements relating to education, skills, training or experience. Such requirements are fundamental, and must be stated from the outset of the application process. Further, this holding is limited to the facts presented: a live-in housekeeper with child care responsibilities. In other job situations, a non-smoking requirement that was not stated in the application or advertisements may fail to provide a reasonable ground for rejection of a U.S. applicant.

### ORDER

Pursuant to 20 C.F.R. §656.27(c)(2), the Certifying Officer is directed to grant certification.

At Washington, D.C.

Entered:

JAMES GUILL  
Associate Chief Judge

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<sup>1</sup> Since many potential applicants for positions wherein labor certification is sought may be smokers, the better practice would be for employers to state a nonsmoking requirement in advertisements.

JG/trs/ds

Litt, Nahum (concurring):

I join in the opinion of the majority. In addition I note that, except in certain restricted areas, the Secretary of Labor prohibits smoking at Department of Labor facilities.

**Jeffrey Sandler, M.D., 89-INA-316**

**Judge LAWRENCE BRENNER, joined by Judges Groner and Romano, dissenting:**

It would have been easy and reasonable for the Employer to specify his requirement that a live-in housekeeper responsible for the care of his young children be a nonsmoker. However, the Employer failed to do this. With sympathy for the result sought by the Employer in this case, the majority, despite its attempt to limit the effect of its decision, opens the door to the improper practice of an employer inventing after-the-fact reasons for rejecting an otherwise qualified U.S. applicant.

Smoking does not yet constitute a trait which in all employers' views would inescapably render an applicant incapable of properly serving in this job due to impairment of himself or the effect on others. While a negative trait for this live-in child care job (at least where the employing parents are nonsmokers), and therefore reasonable to specify in advance as unacceptable, smoking is still a long way from the Employer's examples of alcoholism, child molestation or illegal drug use (Brief, at 9-10). Such a person is so universally recognized as unfit to perform the job that it is unnecessary to specify this in advance. Indeed, I would think it demeaning of the Employer's and the job's circumstances in the eyes of qualified applicants for "no alcoholics, child molesters or illicit drug users need apply" to appear in a job advertisement. The majority itself recognizes the difference by noting that the better practice would be for employers to state in advance a nonsmoking requirement in their advertisements. This "better practice" should be the mandatory practice.

For the above reasons, even assuming Dr. Sandler's good faith in this case, I respectfully dissent. Had the majority been so inclined, because of the legitimacy of the desire for a nonsmoker in this case and the murkiness of the factual dispute over disclosure and reality of the U.S. applicant's experience, on review en banc I would have considered in the interest of fairness, a remand to permit Dr. Sandler to conduct a new recruitment with the nonsmoking requirement specified.

LAWRENCE BRENNER  
Administrative Law Judge