



DATE: DECEMBER 22, 1988
CASE NO. 88-INA-192

IN THE MATTER OF

BOLTON ELECTRIC, INC.
Employer

on behalf of

CHANG SOON KIM
Alien

Appearance: Glenn N. Kawahara, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill,
Schoenfeld, and Tureck,
Administrative Law Judges

NICODEMO DeGREGORIO
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Bolton Electric, Inc., filed the application for labor certification on behalf of the Alien, Chang Soon Kim, for the position of electrician foreman (AF 17). The duties of the position involved the installation of electrical equipment in both commercial and residential settings. The stated requirements were two years experience as an electrical foreman as well as experience in the installation of high voltage wiring. The Employer recruited for the position during August and September of 1986.

In his July 8, 1987 Notice of Findings (AF 9-10), the Certifying Officer (C.O.) proposed to deny the Employer's application, finding that the Employer violated sections 656.1 and 656.2(e) by rejecting qualified U.S. workers.¹ Specifically, relying on a follow-up questionnaire (AF 15), the C.O. determined that a qualified U.S. applicant, Raymond Clegg, had driven 130 miles to interview with the Employer only to find no one was there. The Employer, according to the Notice of Findings, stated that Clegg neither came to his interview, called to cancel, or asked for a new date (see AF 22). The C.O. required the Employer to document why Clegg was not qualified, willing or available at the time of the initial recruitment.

In its rebuttal (AF 6-8) the Employer stated that Clegg was initially scheduled to interview on Friday, November 7, 1986.² The Employer disputes Clegg's contention (made in an August 11, 1987 phone conversation initiated by the Employer to learn more about Clegg's questionnaire answers to the C.O.), that Clegg had called the Employer's secretary to reschedule the appointment and had it changed to Saturday, November 8, 1986. The Employer states that such a scheduling change was not possible as the company is not open on Saturdays, and that Clegg should have recontacted the Employer on the following Monday if he were truly interested in the position. Moreover, the Employer asserts that unsupported statements of applicants should not be given more weight than statements of the Employer. The Employer did not contest that Clegg was a qualified U.S. applicant.

¹ The C.O. cites sections 656.1 and 656.2(e) to deny certification. These sections, while sufficient to provide adequate notice of the deficiency to the Employer, are general introductory sections. However, the Notice of Findings encompasses the violation of a more specific section, 656.21(b)(7), which states: "[i]f U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for job-related reasons."

² The Employer, in its rebuttal, misstates the date of the initial interview as November 7, 1987 and the date of the Saturday interview as November 8, 1987.

In his September 11, 1987 Final Determination (AF 4-5), the C.O. denied the Employer's application, finding the rebuttal statements unconvincing. The C.O. found no documentation to demonstrate that Clegg had requested to change the interview date but, in any event, he credited Clegg's questionnaire statements over the Employer's. He found that Clegg, a qualified U.S. worker, was deterred from pursuing his application for the job. The Employer requested review of this denial and filed a statement of position in support of review. The C.O. did not file a brief.

Discussion

The Employer suggests that Clegg does not qualify as an available U.S. worker because he indicated on the Department of Labor questionnaire that "maybe" he would have accepted the job if offered. This is not dispositive of his availability under the regulations. It is completely justifiable for an applicant to predicate his acceptance upon what the employer states during the interview.

The principal controversy in this case revolves around the characterization and chronology of events concerning Clegg's interview schedule with the Employer. While it is uncontested that Clegg had an appointment with the Employer on Friday, November 7, 1986, the parties agree on little else. The C.O. credits Clegg and implies that the Employer acted in bad faith, purposely scheduling an interview at a time when the Employer knew the place of business would be empty. The Employer's position is first, that no change in the interview date was made, but if by some mistake Clegg was rescheduled to a Saturday and found the business closed, then Clegg should have promptly recontacted the Employer.

Since the Employer originally scheduled Clegg for an interview on Friday, a work day, there is no reason to believe that the Employer purposely rescheduled Clegg for a non-work day. Moreover, the C.O. partially based his findings on a mistaken belief that the Employer argued in rebuttal that Clegg called on August 11, 1986 to change the interview date. Thus, there is no basis in the record to conclude that the Employer acted in bad faith.

However, it is apparent that a mutual mistake occurred as to the date of the interview. Consequently, neither took further action. For this reason, the case is remanded to the Certifying Officer in order to give Clegg another opportunity for an interview, or, if Clegg is no longer available, in order to give the Employer the opportunity to re-advertise the job, and then take further appropriate action.

ORDER

The Certifying Officer's determination denying labor certification is vacated, and the case is remanded to the Certifying Officer for further proceedings consistent with this opinion.

NICODEMO DeGREGORIO
Administrative Law Judge

ND/gaf

In the Matter of BOLTON ELECTRIC, INC., 88-INA-192
Judge LAWRENCE BRENNER, dissenting.

I would affirm the denial of labor certification for two reasons. The first is that I believe Clegg's statement that he called to reschedule the interview. I agree with the majority that there is no reason to believe that the Employer purposely rescheduled the interview for a non-work day. Rather, I assume that when Clegg called to reschedule and was told by the Employer's secretary to come in the next day instead, there was a mistake either on the part of the secretary or Clegg in believing that the interview was being changed from Friday to Saturday, rather than to Monday, the next work day. However, the negligence of the Employer in not keeping track of this important call and therefore not knowing that Clegg had rescheduled the interview to some different day, led the Employer erroneously to believe that Clegg simply had missed the original interview appointment. In the circumstances, the Employer should have known that there was a rescheduling, consequently should have known of Clegg's twice expressed interest in the interview, and therefore should have recontacted Clegg promptly to try to remedy any potential schedule mistake. It is true that Clegg could have recontacted the Employer, or even left a note, upon finding the business closed on Saturday. However, there is no merit in the Employer's contention that Clegg had a greater burden to remedy the mistake.

My second reason for denial of the application is an extension of the first reason. Even where there is no negligence by an employer, mutual mistakes regarding interview appointments, and indeed other contacts, occur. These mistakes cannot easily be sorted out and equitably resolved on poor case records in which parties claim and deny telephone contacts. Moreover, such mistakes cannot easily be remedied satisfactorily by anyone, including this Board, two years after the mistake occurs. Therefore, considering an employer's burden of proof that there are no qualified available U.S. workers, when there is a missed interview I would require an employer to try promptly to recontact the U.S. applicant, and do so or follow-up in writing. The recontact attempt would simply inform the U.S. applicant that due to his failure to appear for the interview at a specified time and place, unless the applicant immediately replies to the contrary the employer will assume that the applicant is not interested in the job. Of course, if the applicant

replies that he is still interested but does not have adequate justification for missing the interview, the employer can take that into account in assessing the applicant's fitness for the job.

Although I do not command a majority in this case, I believe a prudent employer who wishes to be armed before this Board against a C.O.'s charge of improper actions leading up to and after a missed interview or other missed contact, will do much more than the passive Employer in this case.

LAWRENCE BRENNER
Administrative Law Judge

In the Matter of BOLTON ELECTRIC, INC., 88 INA 192
Chief Judge NAHUM LITT, dissenting.

I would affirm the Certifying Officer's denial of labor certification.

NAHUM LITT
Chief Judge