

# Constant vigilance required to manage H-2A delays



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Last month, we discussed the importance of doing your due diligence and making sure your H-2A workers arrive on time. However, as with all plans and processes, nothing is guaranteed. If, despite all your best efforts, your workers are delayed, what are your options?

Your options, if any, depend on the cause of the delay. If you have chosen one of the really good agents, attorneys, associations or contractors to work with, they will already be taking all the preliminary steps necessary to shake the situation loose. These steps include talking directly with key people at the agency where the delay is centered, requesting Congressional pressure, and even discussing specific legal options with an experienced H-2A attorney.

When appropriate and necessary, they will engage you in this process directly. While they may call for Congressional help, it is likely that they will directly involve you in that step so that you are talking directly, with their help, to your own Congressional offices. When you are working with a good agent, they will work through the options with you. It can be counterproductive to go off on your own to make Congressional or agent calls. Always discuss actions with your agent first.

So far this year, the U.S. Department of Labor (USDOL) and Department of State portions of the process are off to a positive start. There have, however, been some concerns

with interpretation of seasonality, need and other issues from U.S. Citizenship and Immigration Services this year.

Near-term, the major concern is whether the continuing resolutions will pass to avoid a government shut-down on April 28, because USDOL would stop processing H-2A applications during any shut-down period. Longer term, the Trump administration has proposed sharp budget cuts for both USDOL and Department of State, which could impact H-2A. Also, as the program grows, the federal agencies involved and the State Workforce Agencies will have to build in significant efficiencies and be provided with sufficient resources to perform on time.

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## After all your best efforts, you may still face delays.

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After all your best efforts, you may still face delays. If your problems appear to be a result of an agent not having done everything necessary, or having made significant mistakes in the application process, then you may be on your own. Again, this is almost always a preventable situation if you choose your agent, attorney, association and contractor carefully; but every year, we talk to employers who are in this situation. If you think you may be in this situation, first, stop and assess how you may have gotten here. If your contractor has always provided great service, has something changed on your end? Be honest with yourself. Have you communicated openly and completely

with them? If not, circle back and make sure that you are working with them fully.

If, after reassessment, it is clear that the agent, association or attorney who filed for you is not working with you, or in the worst instances has gone out of business, you may need to consult with an experienced H-2A attorney very quickly. At this point, remember that you are bringing in outside help late in the game who may or may not be able to help, and there will be costs involved.

In the worst-case scenario – your agent has gone out of business during the application process, or just will not offer help – your options are limited. Call a good H-2A attorney early on and expect that the best outcome will still include delay.

Even though some delay is common, if you have followed all the rules and processes and have chosen to work with a competent and experienced agent, it is unlikely you will reach these last steps. The most common delays we can think of are the occasional computer or printer breakdowns within the federal government, unannounced shifts in an agency's internal interpretations, federal government shut-downs and occasional visa delays/denials that can be caused when a consulate agent believes a worker's answers indicate mistreatment in a previous year. All of these are completely transparent to your agent, attorney, association or contractor, except the consulate hold.

In the end, the H-2A program is less transparent and predictable than we would like it to be, but when you choose the right partners it is the only workable alternative. **FGN**