

# THIRD-PARTY SITE PLACEMENTS OF FOREIGN NATIONALS: ARE YOUR VENDORS IN COMPLIANCE WITH H-1B REGULATIONS?

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A Canadian bank faced an immigration scandal this past spring when a whistleblower shed light on the bank's attempt to replace Canada-based workers with outsourced labor via temporary migrant workers. Given the seriousness of this matter, it may be the right time to identify whether your U.S.-based subsidiary, branch, or affiliate is falling victim to an improper use of the H-1B visa program in the United States.

The H-1B regulations define a U.S. employer as "having an employer-employee relationship with respect to employees ... as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." The "right to control" is the primary element in establishing an employer-employee relationship. An H-1B petitioner (or corporate sponsor) will need to show that it has the right to control when, where, and how the H-1B employee performs the job. In addition, H-1B petitioners are required to demonstrate the existence of the employer-employee relationship for the duration of the H-1B validity period. In determining whether a corporate sponsor has the "right to control" an H-1B employee, the U.S. Citizenship and Immigration Service (USCIS) will employ a "totality of the circumstances" analysis.

In January 2010, the USCIS issued guidance regarding requirements for H-1B corporate sponsors. The guidance discussed the employer-employee relationship requirement for H-1B petitions and concluded that many third-party placement companies do not qualify as H-1B sponsors. Take this scenario as an example: an H-1B employee of a computer consulting company is working at your office on a project to maintain your payroll. The H-1B employee is supervised by your company's management, and all payroll work assignments are determined by your company. In this case, USCIS would likely determine that the computer consulting company had no right to control the H-1B employee and therefore lacked a valid employer-employee relationship with the H-1B employee. Ultimately, this employee may have their H-1B status revoked, and your company is left without the expertise needed to complete the payroll project.

With U.S. unemployment at 7.6 percent, audits of H-1B corporate sponsors are on the rise, which may include an audit of the H-1B employee's worksite (possibly one of your offices). The management of your U.S.-based business should know whether your U.S. vendors are in compliance with all U.S. immigration regulations so as to not jeopardize any projects for which they are providing services.