

better, will try to over-emphasize it. If it isn't present, however, don't worry about it.

(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

This also is not all that critical. Generally, consulting companies are in the business of placing staff with third parties. The work done for the third party is rarely related to this type of business. This factor will be present rarely and you shouldn't worry overly much about its absence.

(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The petitioner can assert that it has the right to place the employee in the job, replace the employee with another worker, and terminate the employee. While this is not "over the shoulder" supervision, it does provide a measure of control over the manner in which the beneficiary's work is accomplished.

Petitioners should not obsess over the presence or absence of specific factors (other than payroll). The authorities cited by the USCIS in the memo all speak to the issue of looking at a variety of factors to determine the existence of an employer-employee relationship.

To the extent that the authorities cited by the USCIS memo did provide lists of factors, they are somewhat different from the list contained in the memo. The USCIS has taken certain liberties and paraphrased factors cited by the courts. This, in turn, raises further questions as to the legitimacy of their understanding and analysis of the law.

On a go forward basis, employers need to think through their petition submissions carefully. We have seen all of these issues raised over the past year in the context of requests for evidence, and have dealt with them successfully. There is no "one size fits all" solution. Satisfying the USCIS requires careful thought, analysis, and creative solutions.

Our experience since January of last year has taught us that it is possible to fashion individual solutions for employers that capitalize on their unique strengths and minimize their particular weaknesses. There is no reason why a legitimate IT consulting company cannot continue to receive H1b approvals. Petition submissions will have to be more carefully documented and argued, but it is not particularly heavy lifting.

If your company would like to discuss possible solutions, please feel free to call us at 818-990-4922 to talk about your situation.

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