STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NAFTALI AND SHIRI HIRSCH	:	DETERMINATION DTA NO. 819652
for Redetermination of Deficiencies or for Refund of New York State and New York City Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Years 1998, 1999 and 2000.	:	

Petitioners, Naftali and Shiri Hirsch, 9 Hachoresh Street, Kfar-Shamaryahu, Israel 46910, filed a petition for redetermination of deficiencies or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1998, 1999 and 2000.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 15, 2004 at 10:30 A.M., and was continued to conclusion on April 29, 2005 at 10:30 A.M.,with all briefs to be submitted by June 30, 2005, which date began the six-month period for the issuance of this determination. Petitioners appeared by Robert Upbin, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel).

ISSUE

Whether petitioners maintained a permanent place of abode in New York State and New York City for the years 1998, 1999 and 2000 within the meaning of Tax Law § 605(b)(1)(B) and Administrative Code of the City of New York § 1305(b) and were, therefore, properly taxed as State and City residents for such years.

FINDINGS OF FACT

In its brief filed June 29, 2005, the Division of Taxation submitted 24 proposed findings of fact, each of which has been substantially incorporated into the following Findings of Fact except for proposed findings of fact "22" and "23" which are irrelevant.

1. In April 2001, Naftali Hirsch and his wife, Shiri Hirsch ("petitioners"), filed an Amended Nonresident and Part-Year Resident Income Tax Return (form IT-203-X) for the year 1998 on which they claimed a refund in the amount of $11,475.00 for such year. The filing status was indicated to be "married filing joint return." The return explained that petitioners were filing the amended return to reflect their status as nonresidents of New York. They indicated that they were residents of Israel who were in the United States on temporary assignments pursuant to H-1B visas. The address set forth on the amended return was 300 East 75th Street, New York, New York. Petitioners' Federal income tax return filed for 1998, which apparently was filed on or before April 15, 1999, indicates petitioners' address as 301 Elizabeth Street, #4K, New York, New York.

For each of the years 1999 and 2000, petitioners filed a Nonresident and Part-Year Resident Income Tax Return (form IT-203) on which they claimed nonresident status on the basis that they were on temporary status in the United States. As was the case for the 1998 amended return, the filing status for the 1999 and 2000 returns was "married filing joint return." On their 1999 and 2000 returns, petitioners listed their mailing address as 300 East 75th Street, New York, New York and also indicated that their permanent home address was 34 Jabotinsky Street, Kfar Sava, Israel.

2. As a result of petitioners' filing of the amended return for 1998 and their claiming nonresident status on their 1999 and 2000 returns, the Division of Taxation ("Division")

conducted an audit of these returns. The Division sent a letter to petitioners' representative which asked that the following information be provided: a copy of the H-1B visas; a copy of petitioners' Federal income tax returns; and a letter from each employer on company letterhead indicating the nature of the business and the taxpayers' specific job titles as well as a copy of the employment contract or similar document and the amount of time required to perform the temporary assignment. In response to the Division's request, petitioners provided a copy of a letter, on the letterhead of Computer Associates International, Inc. ("Computer Associates"), dated September 17, 1997, which was submitted by Computer Associates in support of its petition to obtain H-1B visa status for petitioner Naftali Hirsch.

3. After reviewing the letter from Computer Associates, the Division, on November 15, 2002, issued a Notice of Disallowance for 1998 to petitioners which stated, in pertinent part, as follows:

> In the letter from Computer Associates dated 9/17/1997, it is stated that Mr. Hirsch was hired as a Technical Project Manager. The letter states that Mr. Hirsch will create and implement new and innovative methodologies, create marketing strategies and design and implement technical support policies, along with many other duties.
>
> It is our determination, therefore, that Mr. Hirsch was not hired for a particular and specific purpose but was hired for general tasks. As a result, Mr. and Mrs. Hirsch's apartment in New York City is considered a Permanent Place of Abode in New York State. They are considered statutory residents of New York State and New York City since they maintained a Permanent Place of Abode in New York State/New York City and spent 184 days or more in New York State/New York City.

The Division's letter further advised petitioners that since it appeared that they maintained the same employment and permanent place of abode in 1999, 2000 and 2001[1] as they

[1] The 2001 tax year is not at issue in this proceeding because the Division conceded that petitioners were in the U.S. for fewer than 183 days during 2001.

did in 1998, it would be necessary to adjust their nonresident filing status and issue bills for additional State and City taxes due.

4. On November 25, 2002, the Division issued two notices of deficiency to petitioners for each of the years 1999 and 2000 which asserted deficiencies of $19,659.57 ($9,393.28 in State tax and $10,266.29 in City tax), plus interest, and $19,066.73 ($6,737.43 in State tax and $12,329.30 in City tax), plus interest, respectively.

5. Petitioners thereupon requested a conciliation conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS") which was held on May 7, 2003. During the conciliation proceedings, petitioners provided additional documentation from their former employers which was reviewed by the Division; however, this additional documentation did not alter the Division's position that petitioners were properly held to be resident individuals for the years at issue.

On May 12, 2003, the representative of the Division at the conciliation conference provided copies of certain documents to petitioners' representative which purported to support the Division's position. Among the documents provided was a copy of the New York State income tax field audit guidelines pertaining to place of abode.

The audit guidelines state that it is the Division's position that an employee will be presumed to be present in the State for a fixed and limited period, i.e., a temporary stay, if the duration of the stay is reasonably expected to last for three years or less, in the absence of facts and circumstances which would indicate otherwise. If the stay is realistically expected to last for more than three years, even if it does not actually exceed three years, the stay is considered to be of an indefinite duration.

As to the issue of "particular purpose," the audit guidelines state that it is the Division's position that the term means that an individual is present in the State to accomplish a specific assignment that has readily ascertainable and specific goals and conclusions as opposed to a general assignment with general goals and conclusions.

The audit guidelines also state that it is the Division's position that an individual cannot have multiple or consecutive fixed and limited periods or multiple or consecutive particular purposes.

6. A petition for a nonimmigrant worker under an H-1B visa is filed where an individual has a certain expertise and where a U.S. employer who files the petition wants to utilize that expertise. When the petition is approved by the U.S. Department of Justice, Immigration and Naturalization Service ("INS"), the foreign worker can work for the petitioner but only as detailed in the petition and for the period authorized. Any change in employment requires a new petition to INS. The initial application for an H-1B visa is for a three-year period; however, the period may be extended.

7. During the years at issue herein and during the course of their employment with each of their employers in the United States, petitioners maintained places of abode at 301 Elizabeth Street, Apartment 4K, New York, New York in 1998 and at 300 East 75th Street, New York, New York in 1999 and 2000.

8. During each of the years 1998, 1999 and 2000, petitioners were present in the State and City of New York for more than 183 days.

9. Prior to November 1996, petitioner Naftali Hirsch was awarded a Bachelor of Sciences in Electrical and Computer Engineering from Ben-Gurion University in Beer-Sheva, Israel. From November 1996 until September or October 1997, petitioner Naftali Hirsch was

employed, in valid H-1B visa status, as Technical Manager for Agrifos, LLC ("Agrifos") in New York City. In his position, Mr. Hirsch was responsible for implementing and monitoring the company's technical systems in New York, Florida, Oklahoma and Texas. He worked with progressive business systems to ensure the efficiency of all systems, oversaw purchasing of hardware and software, performed system maintenance and developed preventive maintenance software.

10. On September 17, 1997, Computer Associates, a multi-billion dollar computer software development company, submitted a letter to INS in support of its petition to obtain H-1B status for Mr. Hirsch.

The letter indicated that Mr. Hirsch would "create and implement new and innovative methodologies to market and sell our proprietary line of Desktop software products including CA-Unicenter and CA-Unicenter TNG." He would create marketing strategies and design and implement technical support policies and practices relating to Computer Associates' Desktop products to increase revenues and market share and provide installation support to its customers. He would install and remove software programs and work with Computer Associates' Engineering, Technical Support, Quality Assurance and Operations personnel to ensure that proper communications were being distributed to participating parties in product installations and removal of software and would identify market, product and partner opportunities and participate in the promotion of products to generate awareness and positioning of the company's Desktop products in the marketplace.

The petition of Computer Associates sought to extend or amend the stay of Naftali Hirsch since he already held H-1B visa status. Pursuant to a Notice of Action from INS dated October

14, 1997, Computer Associates' petition was approved and Mr. Hirsch's visa became valid from October 20,1997 to October 15, 2000.

11. Petitioner Naftali Hirsch was employed with Computer Associates from November 3, 1997 until June 19, 1998. According to a letter from Georgette Horrigan of Computer Associates' Human Resources Department, Mr. Hirsch's position with the company was that of "Product Leader for Innoculan."

The vice president for product management for security products at Computer Associates, Gil Arbel, indicated that Naftali Hirsch was responsible for an option of Unicenter TNG called Innoculan which is an anti-virus product. Mr. Arbel stated that "Mr. Hirsch was brought to the team in an effort to improve this option and promote it as the leading Anti Virus product." Hirsch was responsible for marketing, pricing, positioning and "was responsible to bridge between the development team and an Israeli company that provided the core engine of the product."

12. From August 1998 to June 1999, petitioner Naftali Hirsch was employed by Memco Software, Inc. ("Memco") in the position of technical product manager and was based in New York City. On June 12, 1998, INS issued an Approval Notice to Memco for an H-1B visa for Naftali Hirsch which was valid from August 25, 1998 to May 31, 2001.[2] No letter in support of the petition for this visa by Memco was introduced by petitioners so this record includes little about Mr. Hirsch's duties with Memco. However, a letter dated July 15, 2003, from Ori

[2] A copy of this visa was provided by petitioners. The visa contains a stamp stating, "Cancelled Without Prejudice." This visa also contained stamps of U.S. Immigration, New York, N.Y. and Ben Gurion Border Control. While some of the stamped dates are partially illegible, the dates stamped by U.S. Immigration appear to be: September 1, 1998; April 10, 1999; May 20, 1999; June 27, 1999; and November 30, 1999. The Ben Gurion Border Control stamps appear to be for March 24, 1999 and September 10, 1999.

Sternberg who formerly held the position of director of professional services at Memco until it was acquired by other companies[3] outlined Naftali Hirsch's duties.

Mr. Hirsch was responsible for a new product line called SeOS for NT. He served as a liaison between the development team based in Israel and the professional services engineers and customers in the United States. He was instrumental in launching the new product line and incorporating customers' feedback into the development plans and future versions of SeOS for NT.

13. Petitioner Naftali Hirsch next worked for Pelican Security, Inc. ("Pelican") and was granted an H-1B visa which was issued on January 24, 2000 and was valid until October 14, 2002. Pelican's letter in support of the visa application, submitted in November 1999, indicated that Mr. Hirsch's position was to be the director of computer operations with Pelican's New York office "for a temporary period of three years at the annual salary of $100,000." Mr. Hirsch would be responsible for overseeing and managing the development and installation of Pelican's security software products. The letter detailed his job duties as follows:

> Specifically, Mr. Hirsch will create and implement new and innovative methodologies to develop and improve our proprietary line of Pelican X security software. He will create development strategies, and design and implement technical support policies and practices relating to our security software products to increase revenues, market share and proved [sic] exceptional installation support to our customers.
>
> In addition, Mr. Hirsch will participate in the installation of our security software products and work within all facets of our company to assure our New York office provides quality assurance and technical support. Mr. Hirsch will write and review reports detailing the performance of our security software and suggest and develop improvements for production, maintenance and installation. Finally, he will oversee and develop the operations of our New York office including

[3] Memco was acquired by Platinum Technology, Inc. in March 1999; Platinum Technology, Inc. was acquired in June 1999 by Computer Associates, Mr. Hirsch's former employer.

> personnel, technical support, development of software specifications and project feasiblity.

A letter from Irit Rapaport, co-founder of Pelican, dated July 15, 2003, stated that "Mr. Hirsch was the high point of contact to technical issues in the US and was working closely with the development team, located in Israel, to solve issues and provide feedback from the field." Mr. Rapaport's letter indicated that Pelican shut down its U.S. operations in August 2001.

14. Petitioner Shiri Hirsch, was employed as vice president - commercial operations for Agrifos, the same company which had employed petitioner Naftali Hirsch from September 1996 until September or October 1997 (***see***, Finding of Fact "9"). Pursuant to an Employment Agreement dated September 10, 1998, the permanent place of Mrs. Hirsch's employment was the New York, New York area. The Employment Agreement provided that her employment would commence September 10, 1998 and continue through April 8, 2002 and would be automatically renewed thereafter on an annual basis unless terminated by either party on notice. Based upon Mrs. Hirsch's visa with Agrifos (a copy of which was provided by petitioners pursuant to the Division's Demand for a Bill of Particulars) it appears that she was employed by Agrifos prior to the commencement date set forth in the Employment Agreement (September 10, 1998) since the aforesaid visa indicates that it was issued on November 18, 1996 and expired on September 15, 1999. Also provided to the Division in response to its Demand for a Bill of Particulars was a petition for a nonimmigrant worker from Agrifos which sought to extend the stay of Mrs. Hirsch and correspondence from Barst & Mukamal, LLP to Mrs. Hirsch, dated February 3, 2000, which stated that INS approved the nonimmigrant H-1B petition extension submitted on her behalf by Agrifos and also stated that the extension was valid from January 16, 2000 through January 15, 2003.

SUMMARY OF PETITIONERS' POSITION

15. Petitioners assert the following:

a. For the years at issue, petitioner Naftali Hirsch was on a temporary assignment in the United States and always maintained his permanent residence in Israel. While in the United States, he was working under an H-1B visa and was sponsored by various individual employers to engage in very specific and technical job duties. His engineering and computer science background combined with his language skills utilized in dealing with primarily Israeli companies were all integral parts of what Mr. Hirsch did for his employers. Petitioner worked for three employers in the United States, to wit: Computer Associates from October 1997 until July 1998; Memco from August 1998 until June 1999; and Pelican from June 1999 until August 2001.[4] Petitioners' representative testified that between his employment with Computer Associates and Memco and between his employment with Memco and Pelican, petitioner Naftali Hirsch returned to Israel. Upon completion of his employment with Pelican, he returned to Israel where he still resides.

b. Petitioner Naftali Hirsch was hired and employed to perform a very specific and technical function for each of his employers. Since he was here under a temporary work visa, he must, by definition, be here for a temporary period.

c. By law, an H-1B visa application is limited to a three-year period which can be extended, one time, for an additional three-year period. At that time, one would be required to either apply for a permanent resident card (Green Card) and begin the process

[4] The dates for which it is asserted that petitioner Naftali Hirsch worked for each employer was taken from petitioners' response (dated January 20, 2004) to the Division's Demand for a Bill of Particulars. It must be noted that the actual dates of his employment (***see***, Findings of Fact "9" through "12") differ from such responses.

of applying for United States citizenship or return to one's native country which is what petitioners did. Since the term of the visa had a defined limit, it cannot be asserted by the Division that Mr. Hirsch was in the United States for an indefinite or permanent period. Petitioners also maintain that by the very terms of an H-1B visa, the moment that Mr. Hirsch stopped working for one company, he could not work for another employer under that visa and none of Naftali Hirsch's jobs at issue herein was for more than one and one-half years.

d. For the years at issue, petitioner Shiri Hirsch was in the United States pursuant to an H-1B visa. The petitioner for this visa was Agrifos which was her only employer for the audit period. In the response to the Division's Demand for a Bill of Particulars, it is contended that Mrs. Hirsch started her employment with Agrifos during 2000 as a logistic manager to assist point-to-point movement of product from raw material stage to delivery of processed product. Agrifos is engaged in various mining operations and its primary products are phosphate and related fertilizers. At the conclusion of her employment with Agrifos, petitioner Shiri Hirsch returned to her permanent home in Israel.

e. Petitioners maintain that the Division's position, in its audit guidelines, that a stay is of indefinite duration if it is expected to last for more than three years, is arbitrary and irrelevant as to whether the stay was temporary since the most important factor is the intent of the individual at the time at which he enters New York. Petitioners, in their brief, cited ***Matter of Laura Kaltenbacher-Ross*** (Division of Tax Appeals, May 29, 2003), an Administrative Law Judge determination, as well as a number of Advisory Opinions of the Commissioner of Taxation and Finance in support of their position that

their places of abode in New York City were maintained only during a temporary stay for the accomplishment of a particular purpose.

CONCLUSIONS OF LAW

A. The issue in this proceeding is whether petitioners are subject to tax as residents of New York State and New York City which is significant to petitioners because nonresidents are taxed only on their New York State and New York City source income while residents are taxed on their income from all sources (Tax Law §§ 611, 631).

B. It is agreed by the parties that petitioners were not domiciled in New York during the years at issue; petitioners were domiciled in Israel. It is also agreed by the parties that petitioners were present in New York State and New York City for more than 183 days during each of the years at issue. Accordingly, the only issue remaining is whether petitioners maintained a *permanent* place of abode in the State and City during such years.

The relevant statutory provision, Tax Law § 605(b)(1)(B), defines a resident individual[5] as one:

> who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

C. While the term "permanent place of abode" is not defined in the Tax Law, the Commissioner's regulations, 20 NYCRR 105.20(e), provide as follows:

> *Permanent place of abode.* (1) A permanent place of abode means a dwelling place maintained by the taxpayer, whether or not owned by such taxpayer, and will generally include a dwelling place owned or leased by such taxpayer's spouse. . . . *Also, a place of abode, whether in New York*

[5] The definition of a New York City resident is identical to the New York State definition of a New York State resident except for substituting the word "City" for "State" (New York City Administrative Code § 11-1705[b][1][B]).

> *State or elsewhere, is not deemed permanent if it is maintained only during a temporary stay for the accomplishment of a particular purpose*. For example, an individual domiciled in another state may be assigned to such individual's employer's New York State office for a fixed and limited period, after which such individual is to return to such individual's permanent location. If such individual takes an apartment in New York State during this period, such individual is not deemed a resident, even though such individual spends more than 183 days of the taxable year in New York State, because such individual's place of abode is not permanent. Such individual will, of course, be taxable as a nonresident on such individual's income from New York State sources, including such individual's salary or other compensation for services performed in New York State. However, if such individual's assignment to such individual's employer's New York State office is not for a fixed or limited period, such individual's New York State apartment will be deemed a permanent place of abode and such individual will be a resident for New York State personal income tax purposes if such individual spends more than 183 days of the year in New York State. The 183-day rule applies only to taxpayers who are not domiciled in New York State. (Emphasis added.)

D. The evidence in the record is clear and uncontroverted that during the years 1998, 1999 and 2000, petitioners lived in places of abode (two apartments) in New York City (***see***, Finding of Fact "7"). To determine whether these apartments constituted permanent places of abode in the State and City of New York during the years at issue, it is therefore necessary to determine whether (a) they were maintained *during a temporary stay* and (b) whether they were maintained for the *accomplishment of a particular purpose*.

A reading of the regulation clearly indicates that a place of abode will be deemed temporary if and only if both elements are present, i.e., the place of abode was maintained during a temporary stay *and* it was maintained for the accomplishment of a particular purpose. While both components must, therefore, be met, it will be necessary to examine each separately. In addition, since each petitioner was employed in New York during the years at issue, each petitioner will also be addressed separately.

E. In ***Matter of Helnarski*** (Tax Appeals Tribunal, October 11, 1990), the Tax Appeals Tribunal, in deciding whether certain business expenses were deductible under Internal Revenue Code § 162(a)(2), was asked to consider, among other factors, whether a taxpayer's employment was temporary rather than indefinite in nature. The Tribunal, in affirming the Administrative Law Judge who determined that the petitioner's employment during the years at issue was of a temporary nature rather than indefinite, stated:

> The Administrative Law Judge noted that instead of utilizing a durational test to determine whether petitioner's employment was either temporary or indefinite, the better test to apply is to weigh all relevant facts. In reviewing all relevant cases, it is apparent that the Federal courts have refused to place a specific time limit upon the length of employment that would automatically result in employment being characterized as indefinite in nature and have recognized that no single element is determinative of the issue of temporariness (***see***, ***Norwood v. Commr.***, 66 T.C. 467, 470: ***see also***, ***Hicks v. Commr.***, T.C. memo 1986-255, 51 TCM 1257, 1259). Further, it is recognized that the credibility of the witnesses and the weight to be accorded this testimony is an important factor in determining these cases (***see, Six v. United States***, [450 F2d 66, 71-1 USTC ¶ 9694]). As a result, the Tax Court has acknowledged that resolution of this issue is often decided on the unique facts of each case and prior opinions can often provide only minimal guidance (***see, Trapp v. Commr.***, T.C. Memo 1980-49, 39 TCM 1085, 1087; ***Peurifoy v. Commr.*** [358 US 59, 61, 58-2 USTC ¶ 9925]).

F. As to the Administrative Law Judge determination, ***Matter of Laura Kaltenbacher-Ross*** (***supra***), relied upon by petitioners, it is well settled that "[d]eterminations of administrative law judges are not considered precedent, nor are they given any force or effect in other proceedings in the division of tax appeals." (20 NYCRR 3000.15[e][2].) The Advisory Opinions cited by petitioners in their brief are not binding upon the Commissioner except as to the persons to whom the opinion is rendered (Tax Law § 171[24]).

The income tax field audit guidelines which provide that an employee is presumed to be present in the State for a fixed and limited period (a temporary stay) if the duration of the stay is

reasonably expected to last for three years or less and for an indefinite duration if the stay is expected to last for more than three years is simply a guideline for the Division's auditors, rather than a law or a regulation. It is certainly not binding or dispositive in this forum.

Therefore, rather than look to administrative law judge determinations, advisory opinions or audit guidelines to determine whether petitioners' maintenance of their New York City apartments was during a temporary stay, the specific facts contained in the record herein shall be determinative.

G. With respect to petitioner Naftali Hirsch and the issue of whether such petitioner maintained the New York apartments during a "temporary stay," 20 NYCRR 105.20(e) cites to an example of an individual who is assigned to his employer's New York State office "for a fixed and limited period" after which he is to return to his permanent location. Clearly, the fact that the individual will eventually return to his permanent location does not, in and of itself, render the stay as fixed and limited. In this petitioner's case, his H-1B visa, even with extensions, would eventually expire thereby requiring him to return to Israel. That fact, alone, does not, as petitioners contend, make his stay in New York a temporary one unless it can also be found that such stay was "for a fixed and limited period." It seems reasonable, therefore, that the issue of whether the assignment was for a fixed and limited period must be ascertainable at the time of the assignment rather than at some later time.

H. In their brief dated August 24, 2004, petitioners contend that Mr. Hirsch was present in New York for only three years pursuant to three separate H-1B visas petitioned by three separate New York employers and that the maximum amount of time he spent on their respective projects was approximately one and one-half years. Moreover, it is alleged that upon his

completion of each project for each employer, he returned to Israel for at least one month before he was then subsequently petitioned by another company to accomplish its particular project.

First, it must be noted that petitioner Naftali Hirsch did not appear at the hearing or continued hearing to offer sworn testimony. While it was asserted that Mr. Hirsch was serving in the Israeli army and was, therefore, unable to appear, there was no substantiation of that assertion. No sworn affidavits were provided. No passport, airline tickets, credit card receipts or any other type of credible evidence was offered to prove that he did, in fact, return to Israel between his periods of employment with each of his New York employers. While his H-1B visa obtained by Memco contains stamps from U.S. Immigration in New York and from the Ben Gurion Border Control during various dates in 1998 and 1999, it is unclear without explanatory evidence as to the reasons for petitioner's travel between New York and Israel. Since most of the dates stamped on petitioner's visa occurred during periods of his New York employment, it cannot be ascertained, without additional evidence, whether the travel was for business purposes during his employment or for returning to Israel between jobs. Therefore, the allegations that petitioner returned to Israel after completion of his employment with each of the New York employers is rejected for lack of substantiation. This allegation is further rejected because the record indicates that petitions for H-1B visa status were filed by one or more employers on behalf of Naftali Hirsch while he was employed in New York by another employer.

The petition of Computer Associates for H-1B visa status for Naftali Hirsch was not the initial petition for an H-1B visa for this petitioner. Prior to the years at issue, petitioner was employed (from November 1996 until September or October 1997), in valid H-1B status, as a Technical Manager for Agrifos. At the time at which Computer Associates petitioned for H-1B visa status for petitioner (September 17, 1997), it is reasonable to assume that he was working

for Agrifos since the record indicates that he worked for Agrifos until September or October 1997. In any event, petitioner did not enter the U.S. (and New York) from Israel to work for Computer Associates since he was already present in New York. The petition by Computer Associates sought to extend or amend the stay of Naftali Hirsch since he already held H-1B visa status. When Computer Associates' petition was subsequently approved, Mr. Hirsch's visa became valid from October 20, 1997 to October 15, 2000. However, petitioner was employed by Computer Associates only from November 3, 1997 until June 19, 1998.

From August 1998 to June 1999, petitioner was employed by Memco. On June 12, 1998, prior to the end of his employment with Computer Associates, INS issued an Approval Notice to Memco for an H-1B visa for Naftali Hirsch which was to be valid from August 25, 1998 to May 31, 2001. Obviously, this H-1B visa status was petitioned for by Memco while Mr. Hirsch was still employed by Computer Associates since his employment with Computer Associates did not end until June 19, 1998.

After ending his employment with Memco in June 1999, petitioner Naftali Hirsch then worked for Pelican pursuant to an H-1B visa which was issued on January 24, 2000 and was valid until October 14, 2002. It is unclear from the record as to the date on which Mr. Hirsch actually began his employment with Pelican. While Pelican's letter in support of the visa application indicated that petitioner's position was "for a temporary period of three years," his employment with Pelican ended in August 2001 when Pelican shut down its U.S. operations.

It appears, therefore, that while petitioner worked for four different employers from November 1996 through August 2001, his stay was not temporary for the accomplishment of a particular purpose since he was not in New York for a fixed and limited period after which he was to return to his permanent location (Israel). It cannot be stated, as a hard and fast rule, that a

stay cannot be temporary if a taxpayer works in New York for more than one employer because it is possible that each employment was for a fixed and limited period. After one temporary job is completed, it is feasible for a taxpayer to be offered another temporary position by a different employer. However, in such a case, there must be a showing by the taxpayer that each employment was for a fixed and limited period and that each was for the accomplishment of a particular purpose. In the present matter, petitioner Naftali Hirsch has failed to meet this burden of proof, imposed pursuant to Tax Law § 689(e).

I. While the record contains statements from Computer Associates, Memco and Pelican as to job titles and responsibilities for petitioner, there is no indication in the record (other than for his employment with Pelican) as to the duration of petitioner's employment and the reason for which such employment was terminated. Absent an employment contract or other evidence, it must be presumed that petitioner's employment with Computer Associates and Memco was for an unlimited period of time. Moreover, there is no evidence from petitioner or from Computer Associates or Memco that the specific purpose of petitioner's employment, if any, was accomplished prior to his accepting new employment.

J. Petitioners resided in two New York City apartments during the years at issue. There is no evidence in the record as to the periods for which each apartment was rented and there is no indication that the apartments were vacated by petitioners when Mr. Hirsch was between jobs. In fact, it seems highly unlikely that the apartments were vacated between Mr. Hirsch's jobs since petitioner Shiri Hirsch worked continuously for one employer, Agrifos, during this period.

The applicable regulation, 20 NYCRR 105.20(e)(1), is clear that the maintenance of the place of abode, in order to not be deemed a permanent place of abode, must be maintained "for the accomplishment of a particular purpose." With respect to Mr. Hirsch's employment with

Computer Associates, it appears that he was responsible for an anti-virus computer product called Innoculan. However, the letter from Gil Arbel, vice president for product management, indicates that "Mr. Hirsch was brought to the team in an effort to improve this option and promote it as the leading Anti Virus product." Mr. Hirsch was responsible for marketing, pricing and positioning of the product. These responsibilities cover a broad range of job functions and, therefore, cannot be found to be for a particular purpose.

With respect to the period for which petitioner Naftali Hirsch was employed by Memco (August 1998 through June 1999), the record indicates that on June 12, 1998, INS issued an Approval Notice to Memco for an H-1B visa for petitioner. As previously noted, there is no evidence that petitioner gave up his place of abode or returned to Israel between his employment with Computer Associates and Memco. Therefore, it cannot be found that petitioner Naftali Hirsch entered the U.S. (and New York) for a temporary stay for the accomplishment of a particular purpose for Memco since it appears that he was already here for another purpose, i.e., to work first for Agrifos and later for Computer Associates.

Although petitioner's title with Memco was technical product manager, it appears, based upon the letter from Ori Sternberg who held the position of director of professional services at Memco, that petitioner's duties were to be responsible for a new product line called SeOS for NT, to launch the new product line and develop plans for future versions of this product. Since there is no letter in support of Memco's petition for H-1B visa status for petitioner in the record, it is unclear whether petitioner's duties were of a general nature or were for the accomplishment of a particular purpose. In any event, there is no evidence that petitioner's employment with Memco was for a fixed and limited period. There is no employment contract or any evidence from petitioner or Memco as to the anticipated duration of petitioner's employment. Therefore,

it cannot be found that petitioner's stay in New York was temporary or for the accomplishment of a particular purpose.

With respect to petitioner Naftali Hirsch's employment with Pelican, the letter in support of the visa application indicated that his position was to be director of computer operations with Pelican's New York office "for a temporary period of three years." While the period of employment was defined as a temporary period of three years, a reading of this letter reveals that petitioner was to be responsible for overseeing and managing the development and installation of Pelican's security software products. The letter also stated that Mr. Hirsch will "work within all facets of our company to assure our New York office provides quality assurance and technical support." In addition, petitioner was to "oversee and develop the operations of our New York office including personnel, technical support, development of software specifications and project feasibility." This broad range of job duties indicates that petitioner's job consisted of general duties and, therefore, his New York employment with Pelican was not for a particular purpose. Despite the fact that the period of employment was stated to be for a three-year period, it is difficult to ascertain how overseeing the entire operation of the employer's New York office can be a particular purpose with a clearly defined conclusion. Therefore, it cannot be found that for the period for which petitioner Naftali Hirsch was employed by Pelican, that such employment was for the accomplishment of a particular purpose as required by 20 NYCRR 105.20(e)(1).

K. Pursuant to an Employment Agreement between petitioner Shiri Hirsch and Agrifos, her employment, as vice president-commercial operations, was to commence on September 10, 1998 and continue through April 8, 2002 and would be automatically renewed thereafter on an annual basis unless terminated by either party on notice. However, Agrifos obtained an H-1B visa on behalf of petitioner Shiri Hirsch which was issued on November 18, 1996 and was valid

until September 15, 1999. Therefore, it appears that petitioner was employed by Agrifos prior to the effective date of the Employment Agreement. The INS later approved a nonimmigrant H-1B petition extension for Shiri Hirsch which was submitted to INS on her behalf by Agrifos which extended her visa for an additional three-year period from January 16, 2000 through January 15, 2003.

Petitioners' response to the Division's Demand for a Bill of Particulars states that Shiri Hirsch began her employment with Agrifos, a company engaged in various mining operations, during 2000 as a logistic manager to assist point-to-point movement of product from raw material stage to delivery of processed product, including time flow, cost, manpower, inventory policies, production line and subcontractors. The response further stated that her responsibilities included design, implementation and management of mining operations and that she was responsible for coordination with plant personnel to ensure time and cost efficient transport of raw materials and finished product. According to the response, she was also employed as a vice president of commercial operations.

L. Petitioner Shiri Hirsch did not appear at the hearing to offer testimony. The only evidence presented with respect to this petitioner was: (1) a copy of her H-1B visa which was issued on November 18, 1996 and was valid until September 15, 1999; (2) the petition for extension of her visa filed by Agrifos; (3) a letter from the law firm of Barst & Mukamal, LLP advising her that INS had approved the H-1B visa extension; and (4) the Employment Contract between her and Agrifos pertaining to her employment as vice president-commercial operations which was to commence September 10, 1998 and continue through April 8, 2002.

No evidence was produced concerning the dates upon which Shiri Hirsch entered and departed the U.S. It is unclear from the record whether Mrs. Hirsch entered the U.S. (and New

York) prior to the effective date of the Employment Contract since her husband began working for Agrifos in November 1996 and her original visa, obtained by Agrifos, was issued on November 18, 1996. While petitioner's response to the Division's Request for a Bill of Particulars, prepared by her representatives, sets forth her duties with Agrifos, there is no corroborating evidence from either petitioner or Agrifos as to this employment or the periods therefor.

M. It cannot be found that petitioner Shiri Hirsch was in New York during a temporary stay for the accomplishment of a particular purpose. This is true for the following reasons: (1) it is unclear when she began her employment with Agrifos since her initial H-1B visa predates the Employment Agreement with Agrifos by nearly two years; (2) no evidence was produced to prove when she entered and departed New York; (3) if, as it appears, she worked for Agrifos prior to the Employment Agreement, there is no evidence from her or her employer to prove that her earlier employment was specific in nature and that the purpose thereof was accomplished; (4) the Employment Agreement, while stated to be for a three-year period, was automatically renewed on an annual basis which is a clear indication that her presence in New York was not for a fixed and limited period.

N. Based upon the foregoing, petitioners have failed to sustain their burden of proving that the places of abode (the two apartments) maintained by petitioners in New York City were maintained only during a temporary stay for the accomplishment of a particular purpose as required by 20 NYCRR 105.20(e)(1), and therefore, such places of abode must be found to have been permanent places of abode. Accordingly, they were properly taxed as resident individuals by the Division for the years at issue.

O. The petition of Naftali and Shiri Hirsch is denied and the Notice of Disallowance dated November 15, 2002 and the notices of deficiency dated November 25, 2002 are hereby sustained.

DATED: Troy, New York
December 15, 2005

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE