By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 99–7184 Filed 3–23–99; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 97–36]

Anthony D. Funches; Grant of Registration With Condition

On July 31, 1997, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Anthony Delano Funches (Respondent) of Denver, Colorado, notifying him of an opportunity to show cause as to why DEA should not deny his application for registration as a retail distributor of list I chemicals pursuant to 21 U.S.C. 823(h), for reason that his registration would be inconsistent with the public interest.

Respondent filed a request for a hearing on the issues raised by the Order to Show Cause. Following prehearing procedures, a hearing was held in Denver, Colorado on April 8, 1998, before Administrative Law Judge Mary Ellen Bittner. At the hearing both parties called witnesses to testify and introduced documentary evidence. After the hearing, counsel for the Government submitted proposed findings of fact, conclusions of law and argument. On September 9, 1998, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision, recommending that Respondent's application for registration be granted. Neither party filed exceptions to her recommended decision, and on October 13, 1998, Judge Bittner transmitted the record of these proceedings to the then-Acting Deputy Administrator.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts, except as specifically noted, the Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, and his adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Deputy Administrator finds that in 1991 Respondent moved back to Colorado and renewed his acquaintance with a married couple who owned and operated a store called ''The Connection'' located at 4811 East Colfax Avenue, Denver, Colorado. Approximately three years later, the husband died and his widow inherited The Connection. Respondent assisted her in the management of the business and at some print, they married. They eventually separated and his wife abandoned the store at 4811 East Colfax. Respondent obtained a retail business license and registered the store under the trade name ''The Other Connection.'' The Other Connection sells ephedrine products, as well as items such as sunglasses and jewelry, and also provides services such as fax machines and notary.

On August 25, 1995, Respondent applied for a DEA registration as a retail distributor of ephedrine and pseudoephedrine [1] and listed 4811 East Colfax as the proposed registered location. However in light of his divorce settlement, Respondent ultimately moved the business to 4815 East Colfax.[2] In his application, Respondent answered ''no'' to the question which asks, ''Has the applicant ever been convicted of a crime in connection with controlled substances/listed chemicals under State or Federal law, or ever surrendered or had a Federal registration revoked, suspended, restricted or denied, or ever had a State professional license or registration revoked, suspended, denied, restricted or placed on probation?''

On February 6, 1996, a DEA investigator visited The Other Connection as part of a preregistration investigation. The investigator testified at the hearing in this matter that his inspection revealed that Respondent's recordkeeping and security procedures were adequate and that Respondent's transactions were ''well documented.'' In addition to the on-site visit, the investigator conducted a criminal history of Respondent which revealed that on June 1, 1978, Respondent and a co-defendant were charged in the District Court in the County of Denver, Colorado, with Conspiracy to Sell Narcotic Drugs, Sale of Narcotic Drugs, and Possession of a Dangerous Drug in violation of Colorado law. On January 17, 1979, Respondent pled guilty to the misdemeanor charge of possession of marijuana and the other counts against him were dismissed. Respondent was sentenced to 12 months imprisonment with the sentence suspended provided that he not be ''convicted of any state or Federal law, city ordinance other than traffic'' and was fined $250.00.

The investigator testified that further investigation of Respondent's conviction revealed a report of a DEA task force officer which stated that in August 1977, Respondent and his co-defendant made arrangements to sell 56.65 grams of cocaine for $4,000.00 to the undercover officer. According to the report, the three met at a designated location; the undercover officer presented the other two with $4,000.00 in exchange for a package; Respondent opened the package so that the undercover officer could sample its contents; and respondent requested that he and the co-defendant be allowed to keep the remnants of the sample for their own use. According to a laboratory analysis report the substance was cocaine and was purchased by the undercover officer from the co-defendant on August 4, 1977. Respondent's name is not mentioned anywhere in this laboratory analysis report.

Respondent admitted at the hearing in this matter that he was present during the alleged cocaine transaction in 1977, but denied handling either the money or the package of cocaine. He explained that at the time of the transaction he was a professional bodyguard and was present during the transaction to provide protection for the co-defendant. Regarding the marijuana, Respondent conceded that although he cannot recall specifically having marijuana in his possession on that occasion over 20 years ago, it was possible since ''[i]n those years, I was known to have a drink here and there, or a smoke.'' However, Respondent testified that he no longer uses illegal drugs.

In explaining why he indicated on his DEA application that he had never been convicted of a crime related to controlled substances, Respondent testified that he did not believe that he still had a marijuana conviction on his record. It was his understanding that the misdemeanor marijuana charge to which he pled guilty would be ''erased'' from his record after one year. Respondent testified that in the 20 years since his conviction, he has undergone the screening processes required to

[1] The parties stipulated that a DEA registration is not required for the retail distribution of pseudoephedrine, and therefore the only chemical relevant to this application is ephedrine.

[2] The Order to Show Cause listed the proposed registered location as 4811 East Colfax Avenue, however by letter dated July 16, 1996, Respondent submitted a request to modify the address on his application to reflect 4815 East Colfax Avenue. Since Respondent's request to modify his application was submitted prior to the issuance of the Order to Show Clause in this matter, Respondent was not required to obtain permission from DEA to modify his application. *See* 21 CFR 1309.36(a).

become a notary public, to redeem weapons out of pawn, and to purchase property, and at no time has he ever been informed that there is a marijuana conviction on his record.

In arguing against Respondent's registration, the Government concedes that Respondent maintains good records, however it contends that Respondent's 1977 misdemeanor conviction, his failure to report this conviction on his application for registration, and his failure to take responsibility for his role in the alleged 1977 sale of cocaine to an undercover officer indicate that Respondent ''does not possess a sense of the high responsibilities required of a registrant.'' Respondent argues that he did not intend to mislead DEA on his application, that he believed that he no longer had a conviction on his record, that whatever happened over 20 years ago is not an accurate measure of his trustworthiness today, and that DEA's own inspection of his store revealed that he is responsible in his security and recordkeeping procedures.

Pursuant to 21 U.S.C. 823(h), the Deputy Administrator may deny an application for a DEA Certificate of Registration, if he determines that granting the registration would be inconsistent with the public interest. Section 823(h) requires that the following factors be considered in determining the public interest:

(1) Maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) Compliance by the applicant with applicable Federal, State, and local law;

(3) Any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) Any past experience of the applicant in the manufacture and distribution of chemicals;

(5) such other factors as are relevant to and consistent with the public health and safety. Like with the factors found in 21 U.S.C. 823(f) relating to the registration of practitioners to handle controlled substances, these factors are to be considered in the disjunctive; the Deputy Administrator may properly rely on any one or a combination of these factors, and give each factor the weight he deems appropriate in determining whether an application should be denied. *See Henry J. Schwarz, Jr., M.D.,* 54 F.R. 16,422 (1989).

Regarding factor one, the DEA investigator who conducted the preregistration inspection testified that Respondent's security procedures at his store are adequate and that transactions are well documented. The Government conceded that Respondent is a ''scrupulous recordkeeper as well as attentive to proper controls.''

As to factor two, the Government alleged that Respondent participated in the sale of cocaine to an undercover officer in 1977. Judge Bittner found Respondent's testimony credible that he was present, but did not participate in the transaction. However, the Deputy Administrator finds the DEA task force officer's report compelling since it was written at the time of the cocaine transaction. The report indicates that Respondent was not only present, but participated in the transaction by opening the package so the officer could sample its contents and by requesting that he and his co-defendant be allowed to keep the remnants of the sample for their own use. Therefore unlike Judge Bittner, the Deputy Administrator concludes that Respondent was involved in the unlawful distribution of cocaine in violation of 21 U.S.C. 841(a)(1). The Deputy Administrator also finds that Respondent violated Colorado law by being in possession of marijuana at the time of his arrest in 1977.

The Government also alleged that Respondent violated 21 U.S.C. 843(a)(4)(A) by furnishing false material information in his application for registration since he indicated that he had never been convicted of a crime related to controlled substances. Respondent testified that he did not intend to mislead DEA because he honestly believed that his 1979 misdemeanor marijuana possession conviction no longer remained on his record. Judge Bittner found Respondent's testimony to be credible. The Deputy Administrator agrees with Judge Bittner that Respondent did not violate 21 U.S.C. 843(a)(4)(A) because he did not intentionally furnish false information on his application for registration.

Regarding factor three, it is undisputed that Respondent was convicted of one count of misdemeanor possession of marijuana on January 17, 1979, in the District Court in the County of Denver, Colorado.

As to factor four, the record shows that Respondent has been involved in the distribution of chemicals since at least 1994, and there is no evidence of any wrongdoing. In fact according to the DEA investigator, Respondent's recordkeeping and security are adequate.

Finally regarding factor five, Judge Bittner noted that it is appropriate to consider the grounds for revocation of a registration found in 21 U.S.C. 824(a), when determining whether to deny an application for registration. DEA has consistently held that ''the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next,'' and therefore the bases for revocation found in 21 U.S.C. 824(a) are properly considered under 21 U.S.C. 823(f)(5). *See Alan R. Schankman, M.D.,* F.R. 45,260 (1998); *Kuen H. Chen, M.D.,* 58 F.R. 65,401 (1993)). Judge Bittner concluded that because of the similar statutory construction and legislative intent between 21 U.S.C. 823(f) and 823(h), the grounds for revocation found in 21 U.S.C. 824(a) are likewise incorporated into 21 U.S.C. 823(h)(5). Therefore, the Deputy Administrator agrees with Judge Bittner that it is appropriate to consider whether Respondent's application for DEA registration should be denied pursuant to 21 U.S.C. 823(h)(5) and 824(a)(1) on grounds that he materially falsified his application.

There is no dispute that Respondent materially falsified his application by indicating that he had never been convicted of a crime related to controlled substances. However according to Respondent, he believed that he no longer had a conviction on his record, and that nothing has occurred in the 20 years since the conviction to alert him otherwise. As Judge Bittner noted, a registration may still be revoked based upon an unintentional falsification of an application, but a lack of intent to deceive is a relevant consideration in determining whether a registrant or applicant should possess a DEA registration. *See Samuel Arnold, D.D.S.,* 63 F.R. 8687 (1998); *Martha Hernandez, M.D.,* 62 F.R. 61,145 (1997).

Here, Respondent's falsification was not based on intentional or negligent behavior. Instead, Respondent believed that he no longer had a conviction on his record and therefore he believed that he was answering the question correctly when he filled out the application for registration. The Deputy Administrator agrees with Judge Bittner that under these circumstances it would be too sever a sanction to deny Respondent's application for registration based upon his falsification of his application.

Judge Bittner recommended that Respondent should be issued a DEA Certification of Registration. While there is no dispute that Respondent operated his business today in a responsible manner, the Deputy Administrator is extremely troubled by Respondent's failure to acknowledge the nature of his involvement in the 1977 cocaine

transaction. The Deputy Administrator agrees that it would not be in the public interest to deny Respondent's application. However, given Respondent's failure to accept responsibility for his past behavior, Respondent should be subject to greater scrutiny. Therefore, the Deputy Administrator concludes that for three years after issuance of the DEA Certification of Registration, Respondent shall permit the inspection of his premises without an administrative inspection warrant or other means of entry.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the application for registration as a retail distributor of ephedrine, submitted by Anthony Delano Funches, be, and it hereby is, granted subject to the above described condition. This order is effective upon issuance of the DEA Certification of Registration, but not later than April 23, 1999.

Dated: March 17, 1999.

Donnie R. Marshall,

Deputy Administrator.

[FR Doc. 99–7122 Filed 3–23–99; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 98–1]

Jacqueline Lee Pierson Energy Outlet; Denial of Application

On July 31, 1997, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to two businesses with the same address in Westminster, Colorado, The New Connection, and Jacqueline Lee Pierson, Energy Outlet, notifying them of an opportunity to show cause as to why DEA should not deny their applications for registration as a retail distributor of list I chemicals pursuant to 21 U.S.C. 823(h), for reason that the registration would be inconsistent with the public interest.

Both The New Connection and Energy Outlet (Respondent) filed a request for a hearing on the issues raised by the Order to Show Cause, and the matters were docketed before Administrative Law Judge Gail A. Randall. On October 21, 1997, Judge Randall issued a Memorandum and Order consolidating the proceedings regarding The New Connection and Respondent, for hearing purposes only and a hearing was held in Denver, Colorado on February 11 and 12, 1998. At the hearing, all parties called witnesses to testify and introduced documentary evidence. After, the hearing, all parties submitted proposed findings of fact, conclusions of law and argument. On September 30, 1998, Judge Randall issued her Opinion and Recommended Ruling, recommending that Respondent's application for registration be denied. On October 20, 1998, Respondent filed exceptions to Judge Randall's Opinion and Recommended Ruling, and on November 5, 1998, Judge Randall transmitted the record of these proceedings to the then-Acting Deputy Administrator.

The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Deputy Administrator adopts, in full, the Opinion and Recommended Ruling of the Administrative Law Judge. His adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, of any failure to mention a matter of fact or law.

The Deputy Administrator finds that ephedrine is a List I chemical that has legitimate uses, but it can also be used to manufacture methamphetamine, a Schedule II controlled substance. Methamphetamine is a very potent central nervous system stimulant and its abuse is a growing problem in the United States. Ephedrine extracted from over-the-counter ephedrine products is often used in the illicit manufacture of methamphetamine.

In an effort to curb the use of licit chemicals in the illicit manufacture of controlled substances, Congress amended the Controlled Substances Act in 1988 with the passage of the Chemical Diversion and Trafficking Act (CDTA). Pub. L. 100–690, 102 Stat. 4181 (1988). The CDTA required that records and reports be made of certain transactions involving various chemicals. However, products containing ephedrine were exempt from the recordkeeping and reporting requirements because they were approved for marketing under the Federal Food, Drug, and Cosmetic Act. The CDTA also made it illegal to distribute a listed chemical ''knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance. . . .'' See 21 U.S.C. 841(d)(2). This provision applied to the distribution of all listed chemicals including ephedrine products.

In 1979, Jacqueline Pierson began working as a salesperson for MFC Enterprises which operated a chain of four stores called the Connection. Michael F. Carles was the president of MFC Enterprises. In 1990, Ms. Pierson began working at the Connection store located at 7115 North Federal Boulevard in Westminster, Colorado. According to Ms. Pierson, in 1991 and 1992 almost 100% of the store's sales were of ephedrine products; the store was primarily engaged in small sales; and she did not receive compensation based on her sales.

DEA began an investigation of the Connection stores, after receiving information that they were receiving large quantities of ephedrine from an east coast distributor. On July 31, 1991, an undercover DEA agent purchased 10,000 ephedrine tablets from Ms. Pierson at the North Federal Connection store without giving any reason for the purchase.

In February 1992, DEA personnel, acting in their official capacity, went to the North Federal Connection store and advised Ms. Pierson of the recordkeeping and reporting requirements imposed by the CDTA. They also advised Ms. Pierson that ephedrine is often used in the illicit manufacture of methamphetamine and that if she suspected that someone was purchasing ephedrine for that purpose, she should contact DEA.

The undercover agent returned to the North Federal Connection store on August 28, 1992, and purchased 30,000 ephedrine tablets. On this occasion, the undercover agent handed Ms. Pierson a handwritten formula for the manufacture of methamphetamine entitled ''Synthesis for Meth'' and asked her whether the ephedrine tablets he was purchasing would work in the formula. Ms. Pierson indicated that they would.

A second undercover agent made visits to the North Federal Connection store. On June 19, 1992, this undercover agent attempted to buy 20 1,000-count bottles of ephedrine at one of the other Connection stores. An employee at that store sold the undercover agent 10 bottles and told him that he could buy the other 20 bottles at the North Federal Connection store. At the North Federal Connection store the undercover agent met Ms. Pierson and told her that on his next visit he wanted to purchase 75 1,000-count bottles of ephedrine. Ms. Pierson indicated that she would need two days advance notice in order to have that amount available and she would have to talk to her boss about the