to Show Cause to Steven A. Barnes, M.D. (Dr. Barnes) who was notified of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration, BB4875437, under 21 U.S.C. 824(a)(3) and (a)(4), and deny any pending applications for renewal or modification of that registration. Specifically, the Order to Show Cause alleged that Dr. Barnes was without State license to handle controlled substances in the State of Texas. The Order to Show Cause also notified Dr. Barnes that should no request for a hearing be filed within 30 days, his hearing right would be deemed waived.

The Order to Show Cause was sent by certified mail to Dr. Barnes at his registered location in Houston, Texas. The order was returned to DEA on October 20, 2003, by the United States Postal Service with a stamped notation: ''attempted, not known.'' On December 17, 2003, DEA again mailed the Order to Show Cause to Dr. Barnes at a second address, however, the order was not returned. DEA has not received a request for hearing or any other reply from Dr. Barnes or anymore purporting to represent him in this matter.

Therefore, the Deputy Administrator of DEA, finding that (1) thirty days having passed since the attempted delivery of the Order to Show Cause to the registrant's address of record, as well as to a second address, and (2) no request for hearing having been received, concludes that Dr. Barnes is deemed to have waived his hearing right. *See* David W. Linder, 67 FR 12579 (2002). After considering material from the investigative file in this matter, the Deputy Administrator now enters her final order without a hearing pursuant to 21 CFR 1301.43(d) and (e) and 1301.46.

The Deputy Administrator finds that Dr. Barnes is currently registered with DEA as a practitioner authorized to handle controlled substances in Schedules II through V. According to information in the investigative file, on March 15, 2002, DEA received information from the Texas Department of Public Safety (DPS) regarding the termination of Dr. Barnes' DPS Controlled Substance Registration Certificate. The DPS action with respect to Dr. Barnes' State controlled substance registration was taken in conjunction with the temporary suspension of his State medical license by the Texas State Board of Medical Examiners (Board). In support of its order of temporary suspension, the Board found that Dr. Barnes was unable to practice medicine ''* * * with reasonable skill and safety to patients because of excessive use of drugs, narcotics, chemicals, or other substance.''

On April 5, 2002, the Board and Dr. Barnes entered into an Agreed Order. The Agreed Order restricted Dr. Barnes' practice of medicine for a period of five years under various terms and conditions, including Dr. Barnes agreement to abstain from ''the consumption of alcohol, dangerous drugs, or controlled substances in any form unless prescribed by another physician for legitimate and documented therapeutic purposes.''

On February 27, 2003, the Board was notified by a State drug testing service that on February 25, 2003, Dr. Barnes tested positive for cocaine from a head hair sample. Additionally, the Board has been previously notified by the drug testing service that Dr. Barnes had ''a negative dilute drug tests on June 4, 2002, and October 2, 2002.'' After reviewing evidence presented by the Board staff and Dr. Barnes before a Board panel on March 21, 2003, the panel found that Dr. Barnes violated the terms of the April 5, 2002, Agreed Order by ingesting cocaine. As a result, the Board entered an Order on May 27, 2003, suspending Dr. Barnes' Texas medical license. There is no evidence before the Deputy Administrator to rebut findings that Dr. Barnes' Texas medical license has been suspended, or that the suspension has been lifted. Therefore, the Deputy Administrator finds that since Dr. Barnes is currently not authorized to practice medicine in Texas, it is reasonable to infer that he is not authorized to handle controlled substances in that State.

DEA does not have statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without State authority to handle controlled substances in the State in which he conducts business. *See* 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. *See* Richard J. Clement, M.D., 68 FR 12103 (2003); Dominick A. Ricci, M.D., 58 FR 51104 (1993); Bobby Watts, M.D., 53 FR 11919 (1988).

Here it is clear that Dr. Barnes' medical license has been suspended and the suspension has not been lifted. As a result, Dr. Barnes is not licensed to handle controlled substances in Texas, where he is registered with DEA. Therefore, he is not entitled to maintain that registration.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration, BB4875437, issued to Steven A. Barnes, M.D., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for renewal or modification of the aforementioned registration be, and it hereby is, denied. This order is effective September 20, 2004.

Dated: July 27, 2004.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 04–18972 Filed 8–18–04; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 03–15]

K & Z Enterprises, Inc.; Denial of Application

On December 13, 2002, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to K & Z Enterprises, Incorporated, d/b/a/ Georgia Wholesale (Respondent), proposing to deny its application executed on June 15, 2001, for DEA Certificate of Registration as a distributor of list I chemicals. The Order to Show Cause alleged that granting the application of the Respondent would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(h) and 824(a).

The Order to Show Cause was delivered to the Respondent by certified mail, and on January 22, 2003, the Respondent, through its president Kamar Hamrani (Mr. Hamrani), submitted a written response essentially addressing the allegation in the Order to Show Cause. However, there was no mention of any request for hearing in the Respondent's letter.

On February 10, 2003, the presiding Administrative Law Judge Gail A. Randall (Judge Randall) issued an Order for Prehearing Statements, directing the respective parties to file pre-hearing statements. However, in lieu of filing a pre-hearing statement, counsel for DEA filed Government's Request for Finding and Motion for Summary Disposition on February 12, 2003. The Government argued, *inter alia,* that there was no language in any of the Respondent's written submissions where a hearing was requested, as required by 21 CFR 1309.53. The Government therefore requested that Judge Randall make a finding that the Respondent had waived its right to a hearing and the contents of the Respondent's written submissions

be submitted to the Deputy Administrator for determination as to whether or not a registration should be issued.

By Order dated February 19, 2003, Judge Randall afforded the Respondent an opportunity to respond to the Government's motion. The Respondent was directed to file its response by March 12, 2003, however, no such response was ever submitted. Judge Randall found that a hearing had not been requested in this proceeding and on March 18, 2003, issued an Order Terminating Proceedings. Following the termination of proceedings, Judge Randall transmitted the matter to the Deputy Administrator for issuance of a final order.

In light of the above, the Deputy Administrator similarly finds that the Respondent has waived its hearing right. *Aqui Enterprises,* 67 FR 12576 (2002). After considering relevant material from the investigative file in this matter, the Deputy Administrator now enters her final order without a hearing pursuant to 21 CFR 1309.53(c) and (d) and 1316.67 (2003).

List I chemicals are those that may be used in the manufacture of a controlled substance in violation of the Controlled Substances Act. 21 U.S.C. 802(34); 21 CFR 1310.02(a). Pseudoephedrine and ephedrine are list I chemicals commonly used to illegally manufacture methamphetamine, a Schedule II controlled substance. Phenylpropanolamine, also a list I chemical, is presently a legitimately manufactured and distributed product used to provide relief of the symptoms resulting from irritation of the sinus, nasal, and upper respiratory tract tissues, and is also used for weight control. Phenylpropanolamine is also a precursor chemical used in the illicit manufacture of methamphetamine and amphetamine. Methamphetamine is an extremely potent central nervous system stimulant, and its abuse is an ongoing public health concern in the United States.

The Deputy Administrator's review of the investigative file reveals the DEA received an application dated June 15, 2001, from the Respondent. The Respondent's address of record is a location in Doraville, Georgia. The application was submitted on behalf of the Respondent by Mr. Hamrani. The Respondent initially sought DEA registration as a distributor of the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. However, Mr. Hamrani subsequently informed DEA in writing of his desire to withdraw phenylpropanolamine from his company's registration application.

On October 27, 2001, DEA diversion investigators conducted a pre-registration inspection of the Respondent's premises, where they met with Mr. Hamrani. During the inspection, investigators advised Mr. Hamrani of regulatory requirements and problems surrounding the diversion of list I chemicals. The investigators also reviewed security, recordkeeping, and distribution procedures with Mr. Hamrani and provided him with appropriate materials regarding DEA requirements for handlers of listed chemicals.

DEA's inspection revealed that Respondent had become incorporated on March 9, 2001. Mr. Hamrani informed DEA investors that his previous business experience was as a manager/owner of gasoline stations with attached convenience stores. Respondent's primary business consists of wholesale distribution of merchandise to retail convenience stores and jobbers, with a product line that included soda and juice drinks, automotive oil, and various snacks. Mr. Hamrani told DEA investigators of his desire to sell to his customers two boxes of 24 bottles and two boxes of 24 blister paks of ''Heads-Up,'' ''Max Brand,'' and ''Mini-Two-Way'' ephedrine products, as well as nationally recognized pseudoephedrine brand products. Mr. Hamrani estimated that the sale of list I chemical products by his firm would constitute less than one percent of total sales. DEA also requested, and Mr. Hamrani provided, a list of Respondent's proposed customers.

From March through June 2002, DEA investigators conducted verifications of eighteen establishments from the list of prospective customers provided by the Respondent. These customers were located in the vicinity of Atlanta and Lawrenceville, Georgia and were comprised primarily of convenience stores and gas station's. DEA's investigation revealed that four of the purported customers did not exist. Two retailers refused to cooperate with DEA's investigation and another purported customer did not sell over-the-counter products of any kind. Several of the gas station's customers informed DEA personnel that while they purchased beverage and other non-drug products from the Respondent, they had no agreement to purchase over-the-counter medication products from Respondent.

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

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

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

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

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

(5) Such other factors as are relevant to and consistent with the public health and safety.

As with the public interest analysis for practitioners and pharmacies pursuant to subsection (f) of section 823, these factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or combination of factors, and may give each factor the weight she deems appropriate in determining whether a registration should be revoked or an application for registration denied. See, *e.g., Energy Outlet,* 64 FR 14269 (1999). See also *Henry J. Schwartz, Jr., M.D.,* 54 Fed. Reg. 16422 (1989).

The Deputy Administrator finds factors four and five relevant to the Respondent's pending registration application.

With respect to factor four, the applicant's past experience in the distribution of chemicals, the Deputy Administrator finds this factor relevant to Mr. Hamrani's apparent lack of experience in the handling of list I chemical products. The DEA investigative file shows that the Respondent is a retailer of general merchandise and before that, Mr. Hamrani operated gasoline stations with attached convenience stores. Mr. Hamrani's past history as an entrepreneur suggests that he has not had any experience in handling listed chemical products. In prior DEA decisions, the lack of experience in the handling of list I chemicals was a factor in a determination to deny a pending application for DEA registration. See, *Matthew D. Graham,* 67 FR 10229 (2002); *Xtreme Enterprises, Inc.* 67 FR 76195 (2002). Therefore, this factor similarly weighs against the granting of the Respondent's pending application.

With respect to factor five, other factors relevant to and consistent with the public safety, the Deputy Administrator finds this factor relevant to the Respondent's proposal to distribute listed chemical products primarily to convenience stores and gas

stations. While there are no specific prohibitions under the Controlled Substance Act regarding the sale of listed chemical products to these entities, DEA has nevertheless found that business establishments such as gas stations and convenience stores constitute sources for the diversion of listed chemical products. *See e.g., Sinbad Distributing,* 67 FR 10232, 10233 (2002); *K.V.M. Enterprises,* 67 FR 70968 (2002) (denial of application based in part upon information developed by DEA that the applicant proposed to sell listed chemicals to gas stations, and the fact that these establishments in turn have sold listed chemical products to individuals engaged in the illicit manufacture of methamphetamine); *Xtreme Enterprises, Inc.,* supra.

The Deputy Administrator also finds factor five relevant to the results of DEA's verification of the Respondent's proposed customers. Among the Respondent's potential customers were four establishments no longer in existence; two that refused to cooperate with DEA investigator; one that did not sell over-the-counter products of any kind; and several that had no standing agreement to purchase any over-the-counter medication products from Respondent. DEA has previously found that incomplete customer information, or questionable conduct by customers are grounds to deny an application to distribute list I chemicals. *Island Wholesale,* 68 FR 17406 (2003); *Shani Distributors,* 68 FR 62324 (2003).

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 28 CFR 0.100(b) and 0.104, hereby orders that the pending application for DEA Certificate of Registration, previously submitted by K & Z Enterprises, Incorporated be, and it hereby is, denied. This order is effective September 20, 2004.

Dated: July 27, 2004.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 04–18969 Filed 8–18–04; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 03–1]

David A. Hoxie, M.D.; Revocation of Registration

On August 21, 2002, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to David A. Hoxie, M.D. (Respondent), proposing to revoke his DEA Certificate of Registration, BH4678833, pursuant to 21 U.S.C. 824(a)(1) and 824(a)(4), and deny any pending applications for renewal of registration as a practitioner under 21 U.S.C. 823(f). The Order to Show Cause alleged in relevant part that the Respondent materially falsified DEA applications for registration and that his continued registration would be inconsistent with the public interest.

By letter dated September 15, 2002, the Respondent requested a hearing on the issues raised by the Order to Show Cause. Following pre-hearing procedures, a hearing was held on August 26, 2003, in Columbus, Ohio. Counsel for the Government presented the testimony of three witnesses and introduced documentary evidence. The Respondent did not testify on his behalf or introduce any documentary evidence. After the hearing, both parties submitted written proposed findings of fact, conclusions of law, and argument.

On April 7, 2004, Administrative Law Judge Gail A. Randall (Judge Randall) issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision (Opinion and Recommended Ruling), recommending that Respondent's DEA Certificate of Registration be revoked and that any pending applications to renew or modify that registration be denied. On May 24, 2004, counsel for the Respondent filed exceptions to Judge Randall's Opinion and Recommended Ruling and on May 26, 2004, Judge Randall transmitted the record of these proceedings to the Administrator of DEA.

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

The record before the Deputy Administrator shows that as of the date of the hearing, the Respondent was licensed to practice medicine in the State of Ohio. A review of the record in this proceeding reveals that in or around 2002, DEA's Columbus, Ohio office sought assistance from the agency's Los Angeles Field Division in obtaining information on any possible prior arrests in California involving the Respondent. To that end, a diversion investigator from the Los Angeles Field Division contacted the city's police department to obtain arrest records pertaining to the Respondent. The Los Angeles investigator also provided to the Bureau of Records, in Sacramento, Respondent's date of birth and Social Security number to further his search of arrest records involving the Respondent.

According to a Los Angeles Police Department arrest report which was admitted into the record of this proceeding, on or around December 15, 1973, the Respondent was arrested and charged with possession of marijuana. However, there is no record regarding the disposition of this charge. The record also contains an arrest report for September 19, 1978, which documents the Respondent's arrest on a charge of ''Poss Controlled Substance.'' As with the Respondent's prior arrest, the record is silent with regard to the disposition of this charge.

The record also contains a Los Angeles Consolidated Booking Form which documents the July 6, 1980, arrest of the Respondent on the charge of driving under the influence of drugs. However, the record is unclear as to the disposition of this charge. The record contains yet another arrest report dated July 11, 1981, which documents the arrest of the Respondent on the charge of driving under the influence of alcohol and drugs. A field sobriety test performed at the time of the arrest describes Respondent as having ''very poor'' coordination, ''very thick and slurred'' speech, and ''tottering unsteady, falling/stumbling'' balance. The report also notes that the Respondent later entered into treatment where he apparently conveyed to the treating physician that he had smoked two PCP (phenylcyclohexylamine) cigarettes.

The above arrest record also contained a document entitled ''Los Angeles PD Disposition of Arrest and Court Action.'' The exhibit identifies the Respondent as the arrestee and lists his date of birth. However, the section of the form entitled ''Court Information'' was blank and therefore, the disposition of this charge is unclear.

The Respondent was again arrested on August 7, 1983, and charged with possession of PCP. A Government witness testified that he obtained information that the Respondent had entered a final plea of ''Nolo'' to two misdemeanor charges, one for possession of a controlled substance in violation of the State Health and Safety Code, and a second charge related to a vehicle code violation. Pursuant to a