Here, it is clear that Dr. Evans's dental license has been revoked and the revocation order has not been vacated. Consequently, Dr. Evans is not licensed to handle controlled substances in California, the jurisdiction in which he is registered with DEA. Therefore, he is not entitled to maintain that registration.

Order

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, BE3323932, issued to Mark C. Evans, D.D.S, 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 they hereby are, denied. This order is effective July 21, 2006.

Dated: June 12, 2006.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E6–9708 Filed 6–20–06; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 02–47]

John H. Kennnedy, M.D.; Denial of Application; Introduction and Procedural History

On May 31, 2002, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to John H. Kennedy, M.D. (Respondent). The Show Cause Order proposed to deny Respondent's pending application for a registration as a practitioner on the grounds that Respondent had been convicted of a drug-related felony, *see* 21 U.S.C. 823(f)(3) & 824(a)(2), and had committed other acts such as to render his registration inconsistent with the public interest. *See id.* § 824(a)(4).

The Show Cause Order specifically alleged that on September 14, 1999, Respondent was indicted in the United States District Court for the Eastern District of Tennessee on five counts alleging the unlawful distribution of a controlled substance, *see id.* § 841(a)(1),[1] and one count alleging the unlawful possession of marijuana. *See id.* § 844. The Order alleged that on March 6, 2000, Respondent pled guilty to one count of the unlawful distribution of diazepam, in violation of 21 U.S.C. 841(b)(1)(D), and one count of possession of marijuana, in violation of 21 U.S.C. 844. The Order further alleged that on June 19, 2000, the District Court accepted Respondent's guilty pleas and sentenced him to twelve months of home detention and five years of probation. The terms of the probation prohibited Respondent from employment as a physician and from dispensing prescription drugs without the permission of his probation officer.

While the Federal criminal case was ongoing, Respondent was also the subject of state administrative proceedings. On May 9, 2000, Respondent entered into a consent order with the Tennessee Board of Medical Examiners (Board) which revoked his state medical license. The Board found that Respondent had committed unprofessional, dishonorable and unethical conduct. The Board also found that Respondent had dispensed, prescribed or otherwise distributed controlled substances in violation of state or Federal law. On June 15, 2000, Respondent also voluntarily surrendered his DEA Registration, No. AK7140736.

Thereafter, Respondent reapplied for his state medical license. On July 31, 2001, the Board approved his application.

On August 16, 2001, Respondent applied for a new DEA practitioner's registration to handle controlled substances in Schedules II through V. Following an investigation, DEA denied the application and issued the Show Cause Order.

Respondent requested a hearing. The matter was assigned to Administrative Law Judge (ALJ) Mary Ellen Bittner, who conducted a hearing in Chattanooga, Tennessee on April 1 and 2, 2003. At the hearing, both the Government and Respondent called witnesses and introduced documentary evidence. Both parties filed post-hearing briefs. Respondent also filed a letter forwarding the Tennessee Board of Medical Examiners' Order of Compliance, which restored his state license to unencumbered status.

On April 13, 2005, the ALJ submitted her decision. The ALJ concluded that the Government had shown by a preponderance of the evidence that granting Respondent's application for registration would be inconsistent with the public interest. *See* ALJ at 18. The ALJ thus recommended that Respondent's application be denied. *See id.* Neither party filed exceptions.

Having considered the record as a whole, I hereby issue this decision and final order adopting the ALJ's findings of fact and conclusions of law except as expressly noted herein. For the reasons set forth below, I concur with the ALJ's conclusion that granting Respondent's application for a registration would be inconsistent with the public interest. I therefore adopt the ALJ's recommendation that Respondent's pending application be denied.

Findings of Fact

Respondent graduated from the University of Tennessee in 1963. Before entering the University of Louisville School of Medicine, Respondent served in the U.S. Navy and also was a sales representative for the Upjohn Company for a period of seven years.

In 1975, Respondent graduated from medical school and served a one-year internship at Erlanger Hospital in Chattanooga, Tennessee. Following his internship, Respondent entered into a family practice, sharing office space with another physician for a period of seven years. In 1983, Respondent moved his practice to North Park Hospital in Chattanooga and maintained that practice as of the date of the hearing.

Sometime in 1997, the Hamilton County Sheriff's Office received information from an informant implicating a Ms. Beth Harvey in the unlawful sale of Valium (Diazepam), a Schedule IV controlled substance. Mr. Jeffrey Parton, a detective with the Hamilton County Narcotics Division, conducted several interviews of Ms. Harvey. Ms. Harvey told Detective Parton that she had become a patient of Respondent based on the advice of friends who had told her that he was a good doctor to see to obtain diet drugs. Ms. Harvey also told Detective Parton that Respondent would provide her with pain medication without conducting a physical exam and that she could buy hydrocodone samples from him. Tr. 32–33.

Sometime between October 28 and November 10, 1997, the Narcotics Division executed a search warrant at Harvey's residence. During the search, the police found a 1000-count bottle of Valium. Most of the pills were missing. Harvey returned to her residence during the search and was questioned by the police about the Valium's source. Harvey told the police that she had obtained the drugs from Respondent on October 28th, and that she was to sell it on the street and return a portion of the profits to him.

Thereafter, Harvey agreed to cooperate with the police in their investigation of Respondent. Between

[1] Three of the counts alleged the unlawful distribution of dihyrdocodeine; two of the counts alleged the unlawful distribution of diazepam.

November 10, 1997, and January 8, 1998, Harvey visited Respondent's office on five occasions; Harvey also had a phone conversation with Respondent on December 2, 1997. During these events, Harvey wore a wire to record the conversations. While the wire did not work during the November 10, 1997 visit, and the tape of the December 18, 1997 visit was lost, the other conversations were recorded and transcribed. While Harvey did not testify at the hearing, the transcripts were admitted into evidence. Following each episode, the police also debriefed Harvey.

1. Harvey's Undercover Activities

A. The November 10, 1997 Visit

According to Detective Parton, Harvey visited Respondent's office on November 10, 1997. Harvey paid Respondent $100, which she represented to him as his share of the profits from the Valium sales. Harvey also paid Respondent $40 for a sample bottle of Lortab and two sample boxes of Vicoprofen. Both of these drugs contain Hydrocodone, a Schedule III controlled substance. Parton testified that Harvey told him during the debriefing that Respondent did not perform a physical examination. Moreover, Harvey's patient record, which was also admitted into evidence, contains no indication that Respondent dispensed the Lortab and Vicoprofen to her on this date. Gov. Exh. 17. On cross-examination, Respondent claimed that he had given the drugs to Harvey because of her complaints about headaches, but no such diagnosis was recorded on the progress notes. *Id.*

B. The November 19, 1997 Visit

During this visit, Harvey told Respondent that she had sold 150 Valium pills and paid him an additional $ 100 as purported profits from the sales.[2] Harvey then told Respondent that she needed more pills because she did not want her husband to discover that some of the Valium was missing. Respondent, after telling Harvey that ''I don't want to get in deeper, you know,'' Gov. Exh. 3a at 12, then agreed to order another bottle of Valium and advised Harvey that it would take about a week for the drugs to be delivered. Respondent also gave Harvey 42 Lortab tablets. Respondent did not perform a physical exam and there was no therapeutic purpose for the dispensing. Furthermore, Harvey's progress notes contain no record of the visit.

C. The December 2, 1997 Phone Conversation

During this conversation, Harvey asked Respondent whether the Valium had arrived. Respondent told her that it had not, but that she could pick it up at his office the following Tuesday, December 9, 1997.

D. The December 9, 1997 Visit

During this visit, Respondent gave Harvey a sealed 1,000 count bottle of diazepam, a size which manufacturers use to send the drug to pharmacies. Harvey also paid Respondent $100, which she represented to him as his share of the profits from the Valium sales. During the conversation, Harvey told Respondent that she had sold one hundred more. Respondent then asked Harvey if ''nothing else has come out'' of her husband. Gov. Exh.3(C), at 32. Harvey answered ''No,'' but then added that she was ''hoping [that] he ain't going to say nothing about me digging in it.'' *Id.* After counting out Respondent's share of the profits, Harvey told him that she probably had more sold, and then asked ''do you want me to take all of these to replace'' the missing drugs? *Id.* Respondent answered: ''No, no, sell them. Hell, medicine is to sell not to take.'' *Id.* Respondent then instructed Harvey: ''[D]on't let anybody know where any of this stuff is coming from.'' *Id.* at 33.

Harvey then asked Respondent whether he had any pain pills. Respondent told her he had only four pain pills, but that he had 1,000 Xanax. Respondent then asked Harvey if she knew ''anybody that takes Xanax?'' *Id.* at 34. While Harvey offered to sell them for Respondent, Respondent replied that he didn't want her with ''two bottles, two thousand'' pills. *Id.* He then asked Harvey to ''[l]ine me up somebody that can do it.'' *Id.* at 35. Harvey agreed to do so.

E. The December 18, 1997 Visit

On this date, Harvey returned to Respondent's office and paid him $130, which she again represented as being his share of the profits on the Valium sales. Respondent gave Harvey twelve Zydone, a drug which also contains hydrocodone. Harvey did not request the drug, and told Detective Parton that Respondent did not perform a physical exam. Respondent made no record of the visit on Harvey's progress notes.[3] *See* Gov. Exh. 14.

F. The January 8, 1998 Visit

On this date, Harvey returned to Respondent's office. Harvey attempted to pay Respondent $100, which she again represented as his share of the proceeds from the Valium sales. At first, Respondent refused the money as he had apparently received a tip about Harvey. Tr. 276. Respondent then asked Harvey whether she had recently called in a prescription for a cough syrup containing hydrocodone to a local pharmacy. Harvey denied doing so, asking Respondent ''why would I call prescriptions in when I can, hell, you give me everything I want?'' Gov. Exh. 3(E) at 5. Respondent then stated: ''That's what I thought too. But you know that through the years, you know, everything you ever needed or wanted, I've tried to take care of you.'' *Id.* Respondent eventually accepted $100 from Harvey.

2. The Searches

Shortly after Harvey's visit, Detective Parton and other officers from the Hamilton County Sheriff's Office, executed a search warrant at both Respondent's home and office. Mr. Pink Anderson, a DEA Diversion Investigator (DI), assisted with the office search.

At the office, the authorities seized samples of legal controlled substances, marijuana, two empty bottles of Quaalude 300 (a drug which was rescheduled to Schedule I effective August 27, 1984, *see* 49 FR 33870 (1984)), one bottle which contained two Quaalude 300 pills, a 1000 count bottle of alprazolam (Xanax) which contained 958 pills, a cocaine kit consisting of a mirror, razor blades and straw, two receipts from Access Drugs (a local drug distributor), various patient files, and $100, which was in the same denominations as the cash that Harvey had earlier given Respondent.

At Respondent's home, the authorities seized 60 grams of marijuana, a bottle containing marijuana seeds, one hand-rolled marijuana cigarette, several remnants of marijuana cigarettes, and assorted marijuana paraphernalia including a metal tray, a bong, two pipes with residue, rolling papers, and a briefcase which held similar items. The authorities also seized a bottle containing 21 Quaalude 300 pills, a bottle containing 52 Quaalude 300 pills, seven empty Quaalude 300 bottles and one empty Quaalude 150 bottle. Also

[2] The ALJ found that Harvey paid Respondent $150 during the November 19, 1997 visit. *See* ALJ at 5. The transcript of the conversation between Harvey and Respondent indicates that Harvey only counted out money up to the amount of $100. *See* Gov. Exh. 3a at 12. While I therefore make my own finding, it is immaterial to the disposition of this proceeding whether the amount was $100 or $150.

[3] The progress notes do, however, contain a record of a visit on December 22, 1997, which shows a dispensing of 30 Lortab tablets.

seized were samples of Norco, a hydrocodone-based product, 13 empty bottles of pharmaceutical-grade cocaine hydrochloride, and one empty bottle that had contained tetrahydrocannabinol (THC). Respondent's home was not a registered location.

According to DI Anderson, the only records discovered during the search of Respondent's office were the two receipts from Access Drugs. With this exception, Respondent had no records of inventories, receipts or the distribution of controlled substances. DI Anderson testified that although Respondent was not charged, he also violated 21 U.S.C. 843(a)(4)(a), because he failed to keep, make or maintain required records. *See* Tr. 217. Respondent testified that he had not known that he was required to keep receipts and that he had told his office staff that they didn't need to save them.

DI Anderson also conducted the investigation of Respondent's application for a new DEA registration. As part of the investigation, DI Anderson interviewed Respondent regarding his guilty pleas in the Federal criminal proceeding. Respondent told Anderson that he had pled guilty because a government witness was going to give false testimony against him. Tr. 231.

Respondent's Testimony

A. Respondent's Prior Use of Controlled Substances

Respondent testified at the hearing. Respondent stated that he had smoked marijuana occasionally while attending college and medical school and admitted to further use during his initial years as a physician from 1976 to 1979. Respondent claimed that he ''rarely'' purchased marijuana and that most of the marijuana was donated to him. Tr. 439. When questioned as to how patients had become aware that Respondent would accept these ''donations,'' Respondent testified that his patients ''bring wild parsley. They bring a dozen * * * brown eggs. They bring apples. I have patients that will bring apple pies, pecan pies.'' *Id.* at 468. Respondent denied that his patients gave him marijuana as payment and testified that they were ''[j]ust grateful patients in various ways.'' *Id.* Respondent further testified that he had stopped using marijuana in 1979, but that he had continued to accept marijuana donations from his patients, which he then gave to his oldest daughter. Id. at 472–473.

Respondent also testified that he took Quaaludes from 1977 to 1979 as a prescribed treatment for insomnia. Respondent testified that he took all of the Quaaludes that were prescribed to him and denied sharing them with other patients. *Id.* at 437–38. As for the Quaaludes seized during the search, Respondent testified that they had ''expired by [1986 or 1987], and have been in that bag since that time. I can assure you that I didn't know they were in there or they would have been put to use.'' *Id.* at 279.

Initially, Respondent denied using cocaine during the 1976–1983 time period. *Id.* at 437. Later, on cross-examination, Respondent admitted to having used cocaine ''[o]n one or two rare occasions'' during the 1976–1983 time period, and then testified to having used cocaine a ''[h]alf a dozen'' times during the period.*Id.* at 475. Respondent subsequently testified that the empty bottles of cocaine hydrochloride that were seized in the search were provided to him by several pharmacies and that he kept them because he collects old medical supplies. *Id.* at 513. Relatedly, Respondent similarly claimed that some of the Quaaludes ''was a relic of old-timey medicine,'' which ''was given to me by a pharmacist'' for his bottle collection. *Id.* at 515–18.

The Government then turned to the 1983 to 2000 time period, during which Respondent maintained his practice at North Park Hospital. Here again, Respondent initially denied using controlled substances. *Id.* at 478. Respondent, however, then admitted to marijuana use ''[o]n rare occasions. Off duty. Out of town.'' *Id.* Respondent testified that he received the marijuana from patients and friends. *Id.* at 481. The ALJ further found that Respondent had smoked marijuana with his office staff one afternoon after work. As for the marijuana seized during the search of Respondent's office and residence, Respondent testified that it was ''[f]or occasional personal use when very tired and needing to relax.'' *Id.* at 343.

B. The Criminal Investigation and Guilty Plea

On direct examination, Respondent testified that he had never illegally given controlled substances to any of the persons referenced in the search warrant affidavit, which had listed Beth Harvey. *Id.* at 263. He further testified on direct that he only prescribed controlled substances for legitimate medical reasons and this was reflected in patient records. *Id.* at 263–64. He further asserted that Harvey had sought treatment for ''frequent headaches and anxiety attacks,'' *id.* at 270, and that he had prescribed hydrocodone products to treat her headaches.[4] *Id.* at 501; 535. Respondent denied that he had sold hydrocodone to Harvey and asserted that the money he had received from her was payment for the services he provided in treating her. *Id.* at 502–03.

Respondent further denied that he entered into the arrangement with Harvey to sell diazepam and receive a share of the profits. *Id.* at 504–05. Instead, he asserted that the scheme was just ''Beth Harvey talking.'' *Id.* at 505. While Respondent admitted that on October 28, 1997, he had given Harvey a one-thousand count Valium bottle, which then contained ''about 250 or 300 out of date diazepam'' pills, he maintained that he did so ''for her to use for her anxiety and nerves.'' *Id.* at 530.[5] Respondent further testified that he was unaware that Harvey was selling the Valium until the police searched his office on January 8, 1998. *Id.* at 541. When specifically asked by the Government whether Harvey ''all along was telling you that she was reselling the drugs,'' Respondent answered: ''No, it's not a fact. At that point, I should have known that that was the case, but I didn't.'' *Id.* at 542.

With respect to his guilty plea, Respondent testified that he was ''a hundred percent guilty.'' *Id.* at 273. Respondent acknowledged, however, his statement to DI Anderson that he had pled guilty because he expected ''false testimony against me,'' and that he feared that he could have been sent to prison. *Id.* at 342. Respondent then testified that he was not attempting to deny his guilt.

Respondent further testified that following his arrest, he had not used marijuana. Moreover, Respondent had entered into a program run by the Tennessee Medical Foundation that helps physicians address drug and alcohol dependency. Respondent has also been subjected to random drug tests and passed each one. He has also attended 200 hours of continuing medical education and a three-day course at Vanderbilt University on the prescribing and record keeping of controlled substances.

[4] The record indicates that Respondent also gave Harvey hormone replacement shots. Tr. at 271. It is undisputed that the shots were given for a legitimate medical reason.

[5] The ALJ also found that ''Respondent denied providing Lortab to Beth Harvey, instead testifying that she 'helped herself in my drawer before I started locking it up.' '' ALJ at 11 (quoting Tr. at 506). The cited testimony, however, refers to whether Respondent provided Lortab to one of his employees, Sherry Millard. I thus do not accept this finding.

Respondent's Character Evidence

At the hearing, Respondent produced four character witnesses. The first, Stan Lanzo, was a former state prosecutor who had known Respondent for twenty-five years. Mr. Lanzo acknowledged, however, that Respondent was ''[n]ot a real close friend,'' *id.* at 366, that he probably had ''said ten words to him in the last five years,'' *id.* at 373, and was not aware of Respondent's illegal conduct prior to his guilty plea. *Id.* at 375–76.

Larry Young, another former state prosecutor also testified for Respondent. Mr. Young testified that he and Respondent ''were casual friends,'' *id.* at 430, and that he was unaware of the specific facts pertaining to Respondent's illegal distribution and his self-abuse of controlled substances. *Id.* at 430–31.

Walter Puckett, M.D., testified that he had known Respondent from the time when the latter worked as a pharmaceutical sales representative and had encouraged Respondent to go to medical school. Dr. Puckett further testified that he had not maintained a social relationship with Respondent and did not know the specifics of Respondent's guilty plea.

Timothy Davis, M.D., the regional area monitoring physician for the Tennessee Medical Foundation, also testified on Respondent's behalf. Dr. Davis testified that Respondent had entered into a contract to attend weekly support group meetings, that he attended eighty-five percent of the meetings, and that Respondent informed him when he could not make a meeting. On cross-examination, Dr. Davis testified that he did not ''have any particular knowledge of the [criminal] offenses,'' *id.* at 459, and that Respondent had not brought up the subject of his illegal distribution of controlled substances at the support group meetings. *Id.* at 462.[6]

Discussion

The Controlled Substances Act provides that an application for a practitioner's registration may be denied upon a determination ''that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination, the Act requires the consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety. *Id.*

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie, M.D.*, 68 FR 15227, 15230 (2003). I ''may rely on any one or combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether * * * an application for registration [should be] denied.'' *Id.* In this matter, I have carefully considered Respondent's evidence concerning his rehabilitation. But as explained below, having reviewed the evidence I reach the same conclusion the ALJ did—that Respondent still does not accept responsibility for his criminal conduct and cannot be entrusted to properly comply with the requirements of Federal law.

Factor One—The Recommendation of the State Licensing Board

I acknowledge that the Tennessee Board of Medical Examiners has restored Respondent's state license to unencumbered status. It is well established, however, that a ''state license is a necessary, but not sufficient condition for registration,'' and thus this factor is not dispositive. *Id.* Indeed, in light of the evidence adduced at the hearing, and in particular Respondent's disingenuous testimony on several issues (which will be discussed below), I decline to give this factor any weight at all.

Factor Two—Respondent's Experience in Handling Controlled Substances

Respondent's experience in handling controlled substances can only be described as abysmal. Among other things, the record shows that Respondent illegally possessed both marijuana and Quaaludes (methaqualone), two Schedule I controlled substances. Even were I to give Respondent the benefit of the doubt and find that he had obtained some of the Quaaludes pursuant to a lawful prescription, the drugs had been banned in 1984, more than thirteen years earlier. Moreover, were I to credit Respondent's explanation that he had accepted some of the Quaaludes for his bottle collection—an assertion about which the ALJ made no credibility finding—Respondent still violated federal law. One would think that at some point contemporaneous with DEA's rescheduling of the drug—preferably no later than the date by which all stocks were required to be surrendered, *see* 49 FR 33870 (1984)—Respondent would have properly disposed of these drugs, which were then determined to have no legitimate medical use.

The record further indicates that Respondent provided controlled substances to Harvey for no legitimate medical purpose on multiple occasions. Respondent distributed large amounts of diazepam, a Schedule IV controlled substance, to Harvey on two occasions. On the first, October 28, 1997, Respondent gave Harvey 250 to 300 diazepam pills. While Respondent testified that this distribution was ''for her to use for her anxiety and nerves,'' the ALJ did not make a credibility finding regarding this testimony. Based on the fact that Respondent made no record of the dispensing, the testimony of Detective Parton that Harvey told him that she was to sell the drugs and return a portion of the profits to Respondent, and Respondent's acceptance of several cash payments from Harvey as his share of the profits, I conclude that there was no legitimate medical reason for the dispensing and that Respondent's testimony was a fabrication.

On the second occasion, December 9, 1997, Respondent gave Harvey a sealed 1,000 count bottle of diazepam, with the intent that Harvey sell the drugs and return a share of the profits to him. Respondent pled guilty to this count of the indictment and admitted in his post-hearing brief that there was ''no legitimate medical purpose'' for the dispensing. Respondent's Proposed Findings, at 23.

Respondent also provided Harvey with Lortab, Vicoprofen, and Zydone, products which contain Hydrocodone, a Schedule III controlled substance on three separate dates (November 10, November 19, and December 18, 1997). While Respondent testified that he did so to treat Harvey's headaches, the progress notes again contain no indication of either a diagnosis or dispensing on any of these dates. Indeed, the progress notes do not even indicate that Harvey saw Respondent on these dates. Moreover, the evidence indicates that on at least one occasion, the November 10, 1997 visit, Harvey paid Respondent for the drug. I thus conclude that there was no legitimate medical reason for each of these dispensings.

Finally, I note that Respondent committed numerous other violations of the CSA. The record establishes that Respondent failed to keep records of the receipt and dispensing of controlled

[6] Respondent also submitted numerous letters of support from patients.

substances, including invoices for the receipt of controlled substances, a biennial inventory, and a dispensing log. *See* 21 CFR part 1304. Finally, Respondent kept controlled substances at his home, which was not a registered location. *Id.* § 1301.12.

Respondent testified that he first became aware of the record keeping requirements on January 8, 1998, during the search of his office. Tr. 488. At that point, Respondent had been a practicing physician for more than twenty years. Not only is ignorance of the law no excuse, but someone possessing the considerable intelligence required to become a physician ought to have some inkling that compliance with the CSA involves more than just paying a fee and obtaining a registration. Indeed, that the CSA imposes on practitioners a variety of recordkeeping, prescribing and security requirements should be obvious to every applicant for a registration.

For all of the reasons set forth above, I find that factor two provides substantial support for the conclusion that granting Respondent's application would be inconsistent with the public interest.

Factor Three—Respondent's Conviction Record Relating to Controlled Substances

The record establishes that Respondent has been convicted of two violations of the CSA. Specifically, Respondent plead guilty to the unlawful distribution of diazepam, in violation of 21 U.S.C. 841(b)(1)(D), and the unlawful possession of marijuana, in violation of 21 U.S.C. 844. This factor thus supports a finding that granting Respondent's application would be inconsistent with the public interest.

Factor Four—Respondent's Compliance With Applicable State and Federal Controlled Substances Laws

I incorporate the discussion above under factor two with respect to Respondent's unlawful activities in distributing controlled substances, as well as his failure to maintain required records. He also kept controlled substances at his home, a non-registered location. *Cf.* 21 CFR 1301.12.

I also note that Respondent admitted to past use of both marijuana and cocaine, and that the police found marijuana during the searches of both Respondent's office and home. Furthermore, during the search of Respondent's home, the police found marijuana paraphernalia including a metal tray, a bong, two pipes with residue, and rolling papers. Moreover, during the search of Respondent's office, the police found a cocaine kit consisting of a mirror, razorblades, and straw. Respondent's possession of drug-related paraphernalia at the time of the search suggests that Respondent continued his use of these drugs beyond the period which he admitted to. The record thus contains substantial evidence establishing numerous instances in which Respondent failed to comply with applicable laws. This factor thus supports a finding that granting Respondent's application would be inconsistent with the public interest.

Factor Five—Other Conduct That May Threaten Public Health and Safety

Under DEA precedents, an applicant's acceptance of responsibility for his prior misconduct is a highly relevant consideration under this factor. *See Barry H. Brooks*, 66 FR 18305, 18309 (2001); *Prince George Daniels, D.D.S.,* 60 FR 62884, 62887 (1995); *Carmel Ben-Eliezer, M.D.,* 58 FR 65400, 65401 (1993). As the ALJ observed, there were a number of material inconsistencies in Respondent's testimony regarding his prior drug abuse, specifically his use of cocaine. Respondent initially denied using cocaine during the 1976 to 1983 period, Tr. at 437, then admitted using it on ''one or two rare occasions,'' and then changed his story again, acknowledging that he used it a ''half a dozen'' times during that period. *Id.* at 475. While Respondent denied cocaine usage following this period, I am perplexed as to why Respondent would have in his possession the paraphernalia used to snort cocaine fifteen years after he supposedly stopped using the drug, or why he would have 13 empty bottles of pharmaceutical grade cocaine at his residence. Surely one or two empty bottles would have sufficed for his collection.

Respondent also testified that he obtained marijuana from ''grateful patients'' as ''donations.'' *Id.* at 468. It is strange that some patients brought Respondent eggs, or apples or pies, while others knew enough to bring him marijuana. Indeed, in light of the fact that possession of marijuana is a criminal offense, it is odd that a DEA registrant would accept such a ''donation,'' even if he did not intend to personally use it, but instead, give it to his oldest daughter.

In concluding that Respondent refuses to accept responsibility for his conduct, I find particularly significant his testimony regarding the various distributions of controlled substances to Harvey during the 1997–1998 time period. While Respondent admitted that the December 9, 1997, distribution of diazepam was a criminal act, he testified that the other distributions of diazepam and hydrocodone products were for legitimate medical reasons.

At the outset, I note that this is not simply a matter of ''he said, she said.'' Rather, there is substantial corroborating evidence that demonstrates that the other distributions were not for legitimate medical reasons. As explained above under factor two, the progress notes contain no record of the visits during which Respondent provided Harvey with hydrocodone products, let alone a diagnosis of Harvey's condition or a record of the dispensing.

As for the Valium, the record shows that Respondent accepted substantial cash payments from Harvey, which Harvey represented as being his share of the profits from the Valium sales. These payments occurred on three separate dates following the October 28, 1997 distribution of Valium and before Harvey left the office on December 9, 1997, with a new supply. While Harvey's wire did not work on the first date (November 10), it did work during the second (November 19), and third (December 9) visits.

According to the transcripts, during the November 19th visit, Respondent told Harvey ''I don't want to get in deeper, you know,'' and then agreed to order the second bottle of Valium. Gov. Exh. 3a at 12. During the December 9th visit, Respondent stated: ''No, no, sell them. Hell, medicine is to sell not to take.'' Gov. Exh. 3(C) at 33. He then told Harvey: ''[D]on't let anybody know where any of this stuff is coming from.'' *Id.* And later in the conversation, Respondent told Harvey that he had 1,000 Xanax and asked her to ''[l]ine me up somebody that can [sell] it.'' *Id.* at 35. These are not the conversations that occur in the normal course of doctor-patient relations. Rather, they are the words of a drug dealer.

I thus concur with the ALJ's conclusion that Respondent's assertions that he provided the various drugs for legitimate medical reasons are disingenuous. I also agree with the ALJ's conclusion that Respondent refuses to accept responsibility for his misconduct. I further find that Respondent's refusal to accept responsibility greatly outweighs his efforts at rehabilitation. Therefore, I conclude that factor five supports a finding that granting Respondent's application would threaten public health and safety. *See* 21 U.S.C. 823(f)(5). Having considered all of the statutory factors, I concluded that Respondent cannot be entrusted with a DEA registration.

Order

Accordingly, pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b) and 0.104(b), I hereby order that Respondent's application for a DEA Certificate of Registration be, and it hereby is, denied. This order is effective July 21, 2006.

Dated: June 12, 2006.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E6–9706 Filed 6–20–06; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

McBride Marketing; Revocation of Registration

On October 13, 2004, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause proposing to revoke McBride Marketing's (Respondent) DEA Certificate of Registration, 002748MMY, as a distributor of List I chemicals and to deny any pending applications for renewal. As grounds for the action, the Show Cause Order alleged that Respondent's continued registration would be inconsistent with the public interest. See 21 U.S.C. 824(a)(4). Specifically, the Show Cause Order alleged, *inter alia*, that Respondent did not have adequate security to protect List I chemical products from diversion, that Respondent did not maintain adequate sales records in accordance with 21 CFR 1310.06, that Respondent had product shortages, and that Respondent had been acquiring and distributing pseudoephedrine products even though it was not registered to do so.

The Show Cause Order was sent by certified mail, return receipt requested, to Respondent's registered location and receipt was acknowledged on October 20, 2004. Neither Respondent, its owner, nor anyone else purporting to represent it has responded. Because (1) more than thirty days have passed since the receipt of the Show Cause Order, and (2) no request for a hearing has been received, I conclude that Respondent has waived its right to a hearing. See 21 CFR 1309.53(c). I therefore enter this final order without a hearing based on relevant material in the investigative file and make the following findings.

Findings

Ephedrine and pseudoephedrine are List I chemicals that while having therapeutic uses, are easily extracted from lawful products and used in the illicit manufacture of methamphetamine, a schedule II controlled substance. See 21 U.S.C. 802(34). As noted in numerous prior DEA orders, ''methamphetamine is an extremely potent central nervous system stimulant.'' A–1 Distribution Wholesale, 70 FR 28573 (2005). Methamphetamine abuse has destroyed lives and families, ravaged communities, and created serious environmental harms.

Methamphetamine abuse is an especially serious problem in Tennessee, the State in which Respondent's business is located. At the time of the issuance of the Show Cause Order, Tennessee led the Southeast in clandestine lab seizures, accounting for approximately 59% of these seizures during the second quarter of 2004. Moreover, in enacting the Meth-Free Tennessee Act of 2005, the Tennessee legislature found that as a result of these seizures, ''more than 700 children are entering state custody each year.'' 2005 Tennessee Laws Pub. Ch. 18 (Preamble).

Respondent is an unincorporated firmed owned by Mr. Bobby McBride. The firm, which is located at the McBrides' home in Parsons, Tennessee, has held a DEA registration to distribute ephedrine products since 1998. Respondent has approximately 58 convenience store and gas stations customers which purchase listed chemical products. Although Respondent also sells novelty items and toys, listed chemicals account for 30% of its business.

On February 26, 2004, two DEA Diversion Investigators (DIs) visited Respondent to conduct a regulatory investigation. They met with Nancy McBride, the owner's wife and Respondent's bookkeeper, presented her with their credentials and a notice of inspection, and obtained Respondent's consent to the inspection.

During the inspection, the DIs determined that Respondent stored listed chemical products in two mini-vans. While the vans were kept locked at all times, the vehicles did not have alarm systems.

The DIs also conducted an inventory and audit of Respondent's ephedrine products. In reviewing the records, the DIs determined that while Respondent's sales records included the purchaser's name, product description and quantity, the records did not contain the brand name of the products, price, or the customer's address. Therefore, in conducting the audit, the DIs were required to group products together based on package size. Moreover, while Respondent's owner claimed that he conducted a physical inventory each January, the record for January 2003 could not be found. The DIs thus used the record for the January 2004 inventory as the beginning inventory and conducted an accountability audit covering the period of January 1, 2004, through February 26, 2004.

The DI's audit found shortages in both the sixty-count bottles and six-count package sizes. Notwithstanding the relatively short period of the audit, 70 sixty-count bottles and 380 six-count packages were unaccounted for. The DIs also found in Respondent's inventory several pseudoephedrine products, including four boxes of Tylenol Allergy Sinus (with each box containing 50 sealed packets of one caplet), three boxes of Aleve Cold and Sinus (with each box containing 50 sealed packets of two gel caps), and one box of Vick's Nyquil Liquicaps (with the box containing 25 packets of two caplets).

Respondent, however, was not registered to distribute pseudoephedrine products. The DIs confirmed that Respondent had been selling pseudoephedrine products based on their review of sales records and interviews they conducted during customer verification visits.

Discussion

21 U.S.C. 824(a) provides that a registration to distribute List I chemical may be suspended or revoked ''upon a finding that the registrant * * * has committed such acts as would render [its] registration under section 823 of this title inconsistent with the public interest as determined under [that] section.'' In making the public interest determination, the Controlled Substances Act requires the consideration of the following factors:

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

(2) Compliance by the [registrant] with applicable Federal, State, and local law;

(3) Any prior conviction record of the [registrant] 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; and

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

Id. 823(h).

''[T]hese factors are considered in the disjunctive.'' Joy's Ideas, 70 FR 33195, 33197 (2005). I ''may rely on any one or combination of factors, and may give each factor the weight [I] deem[] appropriate in determining whether a registration should be revoked or an