substances and maintain her DEA 222 forms. More importantly, however, the record clearly reflects that the Respondent created serious risks of diversion through her practice and failed to otherwise mitigate those risks. Thus, I find the Government has met its burden of proof that the Respondent's continued registration would not be in the public's interest.

The Respondent, however, has not accepted responsibility for all of her wrongdoing, nor has she adequately assured this tribunal of future compliance.

In balancing the statutory public interest factors and the Respondent's remedial efforts, I conclude that revocation of the Respondent's DEA Certificate of Registration, and denial of any pending renewal applications, would be consistent with the public interest in this case.

Accordingly, I recommend that the Respondent's Certificate of Registration be revoked and any pending applications for renewal be denied.

June 17, 2011.

Gail A. Randall,
Administrative Law Judge.

[FR Doc. 2011–25231 Filed 9–29–11; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–77]

Kimberly Maloney, N.P.; Decision and Order

On February 4, 2011, Administrative Law Judge Timothy D. Wing issued the attached recommended decision. Neither party filed exceptions to the decision.

Having reviewed the entire record, I have decided to adopt the ALJ's ruling, findings of fact, conclusions of law (except as explained below), and recommended order. Accordingly, Respondent's application for a registration will be granted subject to a condition.

In his discussion of factor three—Respondent's ''conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances,'' 21 U.S.C. 823(f)—the ALJ found that she had pled guilty to a felony count of obtaining a narcotic drug by means of a forged prescription in violation of Cal. Health & Safety Code § 11368. ALJ at 15–16.[1] However, pursuant to Cal. Penal Code § 1000.1, Respondent was allowed to participate in the deferred entry of judgment program, GX 10, and upon her successful completion of treatment, her guilty plea was set aside and the charge was dismissed. GX 11.

Noting that California law provides that ''[a] defendant's plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose unless a judgment of guilty is entered pursuant to'' Cal Penal Code § 1000.3, and that Agency precedent holds that a deferred adjudication is nonetheless a conviction for purposes of the CSA, the ALJ explained that ''the fact that a finding of guilt was specifically not entered as to Respondent and the charges dismissed, leaves open the question as to whether Respondent's plea constitutes a conviction under 21 U.S.C. 823(f).'' ALJ at 17. The ALJ deemed it unnecessary to reach the issue, however, reasoning that the offense committed by Respondent ''does not 'relate[] to the manufacture, distribution, or dispensing of controlled substances,' the standard embraced in'' 21 U.S.C. 823(f)(3). *Id.* (citing *Super-Rite Drugs,* 56 FR 46014 (1995)).

Contrary to the ALJ's understanding, the Agency has long since resolved both issues. In *Edson W. Redard,* 65 FR 30616 (2000), a practitioner, who was charged with three felony counts of obtaining and attempting to obtain hydrocodone by fraud under California law, pled *nolo contendere* to a single count and was allowed to participate in the State's deferred entry of judgment program (the same statutory scheme at issue here), which he successfully completed. *Id.* at 30617–18. Thereupon, the state court granted deferred entry of judgment and the charges were dismissed. *Id.* at 30618.

Thereafter, the Agency proposed the revocation of the practitioner's registration on the ground that he had been convicted of a felony offense relating to controlled substances under state or Federal law. *Id.* (citing 21 U.S.C. 824(a)(2)). In opposition, the practitioner argued that he had not been ''convicted of a felony offense [because] no judgment was entered against him and the criminal proceedings were dismissed.'' *Id.*

The Agency rejected the practitioner's argument, explaining that ''there is still a 'conviction' within the meaning of the Controlled Substances Act even if the proceedings are later dismissed. * * * [A]ny other interpretation would mean that the conviction could only be considered between its date and the date of its subsequent dismissal.'' *Id.* (int. quotations omitted). The Agency thus held that the practitioner had ''been convicted of a felony relating to controlled substances'' and that this was ground to revoke his registration under 21 U.S.C. 824(a)(2). *Id.*

In *Harlan J. Borcherding,* 60 FR 28796 (1995), a practitioner who had been indicted under Texas law on three counts of prescribing a controlled substance ''without a valid medical purpose,'' was allowed to plead guilty to a single misdemeanor count and was placed on probation; following the practitioner's completion of his probation, the proceeding was dismissed without an adjudication of guilt. *Id.* at 28797. While the practitioner argued ''that he had not been 'convicted' of any offense within the meaning of 21 U.S.C. 823(f)(3),'' the Agency rejected the argument, holding that ''[t]he law is well settled that a DEA registrant may be found to have been 'convicted' within the meaning of the Controlled Substances Act, despite a deferred adjudication of guilt.'' *Id.* (citations omitted).

More recently, in *Pamela Monterosso,* 73 FR 11146, 11148 (2008), a case in which an applicant pled guilty to a state law controlled substance offense but was granted probation before judgment and the charge was dismissed, I explained that ''DEA has long taken the view that even when a court withholds adjudication and ultimately dismisses the charge after the completion of probation, the proceeding is still a conviction within the meaning of the Controlled Substances Act.'' *See also Thomas G. Easter II,* 69 FR 5579, 5580–81 (2004) (''DEA has consistently held that a deferred adjudication of guilt following a guilty plea, is a conviction within the meaning of the Controlled Substances Act.''); *Clinton D. Nutt,* 55 FR 30992 (1990); *Eric A. Baum,* 53 FR 47272 (1988); *Stanley Granet Rosen,* 50 FR 46844 (1985).

Moreover, the Superior Court form evidencing Respondent's guilty plea includes the ''Court's Finding And Order.'' GX 9, at 3. This section of the form concludes by stating: ''The Court accepts the defendant's plea and admissions, and the defendant is convicted thereby.'' *Id.* For purposes of the CSA, including whether this action must be disclosed on an application for registration and whether it provides ground to deny an application or revoke a registration, *see* 21 U.S.C. 824(a)(1) & (2), Respondent's plea and the Superior Court's finding constitutes a conviction notwithstanding that her plea was eventually set aside and the charge dismissed.

As discussed above, the ALJ also concluded that Respondent's offense of obtaining a prescription for a controlled

[1] All citations to the ALJ's decision are to the slip opinion as issued by him.

substance by fraud ''does not relate to the manufacture, distribution, or dispensing of controlled substances.'' ALJ at 17 (quoting 21 U.S.C. 823(f) and citing *Super-Rite Drugs,* 56 FR 46014, 46015 (1991)). However, the underlying offense at issue in *Super-Rite Drugs* was a state law offense of possession of cocaine and not possession with intent to distribute. *See* 56 FR at 46014. The case thus does not stand for the proposition cited by the ALJ.[2]

Most significantly, in several cases, the Agency has held that the offense of obtaining controlled substances by using fraudulent prescriptions constitutes an offense related to the manufacture, distribution, or dispensing of controlled substances within the meaning of factor three. *See Redard,* 65 FR at 30619 (practitioner obtained controlled substances by issuing fraudulent prescriptions); *Ronald D. Springel,* 62 FR 67092, 67094 (1997) (holding that conviction for federal offense ''of obtaining a controlled substance by fraud'' was actionable under factor three); *Rick's Pharmacy, Inc.,* 62 FR 42595, 42597 (1997) (same); *Ronald Phillips,* 61 FR 15304, 15305–06 (1996) (same). Forging a prescription to obtain a controlled substance clearly relates to the ''distribution[] or dispensing of controlled substances,'' 21 U.S.C. 823(f)(3), whether the practitioner wrote the prescriptions on her own pad, or, as here, stole prescriptions from another practitioner's pad.

However, aside from the ALJ's analysis of factor three, I agree with the ALJ's findings as to the remaining factors. Moreover, I agree with the ALJ that Respondent has ''credibly'' accepted responsibility for her misconduct and that she has put forward compelling and unrebutted evidence of her rehabilitation, thus demonstrating that ''she will not engage in future misconduct.'' ALJ at 22. Because there is no evidence that Respondent harmed others or diverted the drugs she illegally obtained, and this episode is, in essence, a first offense, I conclude that consideration of the Agency's interest in deterrence is not warranted. Accordingly I will adopt the ALJ's recommended order and grant Respondent's application for registration subject to the following condition.

(1) Any violation of either condition 13 or 14 of the California Board of Registered Nursing's Order shall be deemed an act inconsistent with the public interest and subject her registration to proceedings under 21 U.S.C. 824(a).

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Kimberly Maloney, N.P., for a DEA Certificate of Registration as a mid-level practitioner be, and it hereby is, granted. This Order is effective immediately.

Dated: September 19, 2011.

Michele M. Leonhart,

Administrator.

Paul E. Soeffing, Esq., for the Government.

Kimberly Maloney, N.P., Pro Se, for the Respondent.

Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

Introduction

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* to determine whether the Drug Enforcement Administration (DEA) should deny a nurse practitioner's application for a Certificate of Registration (COR) as a mid-level [1] practitioner. Without this registration the nurse practitioner, Kimberly Maloney, N.P. (Respondent), of Chula Vista, California, will be unable to lawfully handle controlled substances in the course of her practice.

On September 10, 2010, the DEA Deputy Assistant Administrator, Office of Diversion Control, issued an Order to Show Cause [2] (OSC) to Respondent, giving Respondent an opportunity to show cause why the DEA should not deny her application for a DEA COR, assigned Control No. W09131151M, pursuant to 21 U.S.C. 824(a)(4), and deny any other pending applications for a DEA COR, alleging that Respondent's registration would be inconsistent with the public interest, as that term is defined in 21 U.S.C. 823(f).

In substance, the OSC alleges that:

1. On February 18, 2009, Respondent applied for a DEA COR (Control No. W09131151M) as a mid-level practitioner in Schedules II through V with a registered address of 3855 Health Sciences Drive, La Jolla, CA 92093–9191 and a mailing address of 1503 Apache Drive, Unit A, Chula Vista, CA 81910;

2. In a letter dated April 3, 2009, Respondent requested that the registered address for her application be changed to eStudysite, 452 Medical Center Court, Chula Vista, CA 91911;

3. In 2006, Respondent forged prescriptions on a doctor's prescription pad for Actiq (fentanyl) and OxyContin (oxycodone), both Schedule II controlled substances, to support a drug habit for Respondent. Respondent injected herself with Actiq after dissolving it in saline. Respondent used her health insurance to pay for these forged prescriptions;

4. On January 19, 2007, the San Diego District Attorney's Office filed a felony complaint against Respondent for violations of Cal. Health & Safety Code § 11173(a) (obtaining prescriptions by fraud or deceit) and Cal. Penal Code § 459 (burglary). On April 17, 2007, Respondent pleaded guilty to a felony count of obtaining a narcotic drug (OxyContin) by means of a forged prescription, in violation of California Health & Safety Code § 11368. The court deferred entry of judgment for eighteen months and ordered Respondent to enroll in and complete a California Penal Code § 1000 drug treatment program;

5. On December 21, 2006, Respondent began the McDonald Center Intensive Outpatient Alcohol and Drug Rehabilitation Program a seven-week, three-nights-per-week program. Respondent completed this program on February 8, 2007. Subsequently, Respondent enrolled in Scripps McDonald Center's Chemical Dependency Aftercare program, a one-year, one-night-per-week program. Respondent completed this program on February 7, 2008. On October 22, 2008, the court dismissed the felony criminal complaint against Respondent; and

6. On July 31, 2009, the California Board of Nursing filed an Accusation against Respondent alleging unprofessional conduct for possession of controlled substances without a prescription and unprofessional conduct for use of a controlled substance. The administrative adjudication of the Accusation is ongoing.[3]

[2] It is acknowledged that there are a number of older cases which held that convictions for the offense of simple possession of a controlled substance could be considered under factor three. However, in *Alvin Darby,* 75 FR 26993, 27000 (2009), I explained that a conviction for simple possession does not fall within factor three. However, as I also noted in *Darby,* such a conviction can be considered under factor five. *Id.*

[1] *See* 21 CFR 1300.01(b)(28) (2010).

[2] ALJ Ex. 1.

[3] Respondent's post-hearing brief, filed on January 25, 2011, indicates that the California Board of Registered Nursing (BRN) adopted the proposed decision of the California Administrative Law Judge (ALJ) on December 28, 2010, and notes that the BRN took the extraordinary step of reducing Respondent's period of probation to one year and cost recovery to zero. The Government filed with its post-hearing brief a December 28, 2010 Order of the BRN entitled ''Decision After Non-Adoption,'' of which I take official notice. (*See* Gov't Br. at Gov't Ex. 17.) Under the APA, an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request, to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); 21 CFR 1316.59(e) (2010); *see, e.g., R & M Sales Co.,* 75 FR 78,734, 78,736 n.7 (DEA 2010). Respondent can dispute the facts of which I take official notice by filing a properly supported motion for reconsideration

Continued

Respondent, appearing *pro se,* timely requested a hearing on the allegations in the OSC. Following prehearing procedures, a hearing was held in San Diego, California, on December 14, 2010, with the Government represented by counsel and Respondent appearing *pro se.* Both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law and argument. All of the evidence and post-hearing submissions have been considered, and to the extent the parties' proposed findings of fact have been adopted, they are substantively incorporated into those set forth below.

Issue

Whether the record establishes by substantial evidence that Respondent's application for a DEA COR, Control Number W09131151M, as a mid-level practitioner, should be denied pursuant to 21 U.S.C. 823(f) and 824(a)(4), because Respondent's registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f).

Evidence and Incorporated Findings of Fact

I. Background

The parties stipulated as fact the allegations contained within the OSC. (Tr. 17.) Additionally, at hearing the parties stipulated to the admission and consideration of Government Exhibits 1–16 and Respondent Exhibits 1–8. (Tr. 16.)

Respondent's education includes: A 1992 Bachelor of Science degree in Biology from San Diego State University, a 1995 Bachelor of Science degree in nursing from San Diego State University and a 2000 Masters of Science/Nurse Practitioner Critical Care degree from the University of Pennsylvania. (Resp't Ex. 2.) Additionally, Respondent's professional experience between August 2000 and November 2006 includes work as a nurse practitioner in various medical settings to include neurosurgical patient care, neuro-radiology and a trauma department. (*Id.*) Respondent's professional experience between August 2007 and October 2009 includes work as a lecturer, bone marrow transplant patient care, and care of patients involved in various research studies. (*Id.*) More recently, Respondent has stopped seeking employment pending final resolution of her application for a DEA COR, explaining that most ''of the positions I have sought require a DEA certificate or else eligibility within a year.'' (Tr. 54–55.)

II. The Investigation of Respondent

At hearing, the Government presented the testimony of two witnesses: DEA Diversion Investigator Lucia Bartolomeo (DI Bartolomeo) and DEA Diversion Investigator Ayoma Rudy (DI Rudy). DI Bartolomeo credibly testified in substance that she has been a diversion investigator with DEA for approximately twenty-two years and has been assigned during that time to the DEA San Diego Field Division. (Tr. 21.) DI Bartolomeo's education and training includes basic diversion investigator training along with a Bachelor of Science degree. (Tr. 21.) DI Bartolomeo began an investigation of Respondent in 2006 after receiving an investigative lead that Respondent was in possession of a prescription pad, not her own, and possibly forging controlled substance prescriptions to obtain oxycodone and fentanyl for herself. (Tr. 22.)

The evidence further included two California Controlled Substance Utilization Review and Evaluation System (CURES) patient activity reports for Respondent, obtained by DI Bartolomeo as part of her investigation of Respondent. (Gov't Ex. 3; Tr. 22.) The first CURES report covers the time period from September 2003 to October 2006 and the second from December 2006 to April 2007. (Gov't Ex. 3.) The first report reflects numerous prescriptions for oxycodone and Actiq, the brand name for fentanyl; in the majority of instances the pharmacy listed is Bonita Pharmacy. (*Id.*) DI Bartolomeo further testified to obtaining prescriptions from Bonita Pharmacy in Respondent's name, many of which had been issued in the name of Dr. [JR]; DI Bartolomeo noted discrepancies to include sequential serial numbers and inconsistent hand writing. (Tr. 24–26.) DI Bartolomeo also testified to meeting with Dr. [JR], who confirmed that ''many of the prescriptions were not his true signature.'' (Tr. 26.)

DI Bartolomeo testified that she met with Respondent on December 18, 2006, and Respondent admitted to forging prescriptions and identified nine prescriptions that she forged. (Tr. 27; *see* Gov't Ex. 2 at 9, 14, 16, 18, 20, 22, 24, 26 & 28.) DI Bartolomeo explained that Respondent admitted ''[t]hat she had forged those prescriptions in order to obtain Actiq and some oxycodone, and she explained that she wasn't getting additional prescriptions from her physician. So that's why she had done this activity.'' (Tr. 29.)

Documentary evidence submitted by the Government also included a July 31, 2009 Accusation filed by the California BRN, alleging four causes of discipline against Respondent for unprofessional conduct, specifically: ''Possession of Controlled Substances Without a Prescription''; ''Use of a Controlled Substance''; ''Prescription Forgery''; and Violation of the Nursing Practice Act.'' (Gov't Ex. 13.) The Accusation states in relevant part that

> [o]n or about December 18, 2006, an RxNET agent interviewed Respondent at the San Diego Bureau of Narcotics Enforcement office. Respondent initially denied forging any prescriptions, but eventually admitted that she had stolen Dr. [JR]'s prescription pad from his La Jolla office. Respondent stated that she forged prescriptions for Oxycontin and Actiq to administer to herself for migraine headaches. Respondent further admitted that she would dissolve the Actiq in a saline solution and inject herself with it.
>
> (*Id.* at 6.)

On April 1, 2007, Respondent voluntarily surrendered her DEA COR ''while in treatment for substance abuse.'' (Gov't Ex. 1 at 3.)

DI Rudy credibly testified in substance that she has been assigned to the DEA San Diego Field Division as a diversion investigator since 2005, and her education includes a Bachelor's degree in criminal justice. (Tr. 35.) DI Rudy testified that she became involved in the investigation of Respondent in February 2009 when Respondent applied for a DEA registration as a mid-level practitioner. (Tr. 36.) DI Rudy further testified that at the time of application, Respondent was exempt from payment of an application fee because Respondent's proposed registered location at that time was a state university. (Tr. 37–38, 41; *see* Gov't Ex. 1.) Subsequent to Respondent's initial application, Respondent wrote a letter, dated April 3, 2009, requesting that DEA change the address of her intended registered location to a facility that is a non-exempt entity for purposes of registration fee. (Tr. 38; *see* Gov't Ex. 14.) DI Rudy further testified that there was no indication or implication that Respondent intended to avoid paying the application fee. (Tr. 41.)

The Government's documentary evidence included a handwritten confession by Respondent dated December 18, 2006, describing several life stresses and admitting to taking ''the prescription pads because I was scared that my migraines were out of control, that I would need more medicine.

within twenty days of service of this Recommended Decision, which shall begin on the date it is mailed. *See, e.g., Joseph Gaudio, M.D.,* 74 FR 10,083, 10,088 (DEA 2009) (granting respondent opportunity to dispute officially noticed facts within fifteen days of service).

* * *'' (Gov't Ex. 4.) The Government also submitted as evidence three photographs (Gov't Ex. 5), which Respondent testified were taken on the day she met with DI Bartolomeo and another person (Tr. 60). Respondent speculated that investigators photographed her arm because ''they wanted to prove that I was a drug addict.'' (Tr. 61.) Respondent was candid: ''I'm not here to dispute the fact that I got addicted to drugs. I mean, I accept what happened, and I'm here to tell you what happened after that. So I don't dispute that they took pictures of me on that day.'' (Tr. 61.) No other testimony or evidence was offered with regard to the photographs.

The record also contains a February 8, 2007 letter from the McDonald Center for Alcoholism and Drug Addiction Treatment, La Jolla, California (McDonald Center), certifying that Respondent successfully completed an intensive, seven-week outpatient alcohol and drug rehabilitation program on February 8, 2007, noting that Respondent ''showed a high level of commitment to her sobriety * * * was a willing participant in all aspects of the program [and] completed all of her written assignments on time.'' (Gov't Ex. 6.)[4] A February 7, 2008 Chemical Dependency Aftercare Letter of Completion from the McDonald Center confirms that Respondent successfully completed fifty-two sessions required by its Nursing Diversion Program. (Gov't Ex. 7.)[5] The letter also notes that Respondent ''met all requirements and expectations of the aftercare program. Her positive attitude and adherence to the Aftercare requirements have shown a concern and care for her continued recovery.'' (Gov't Ex. 7.)

Finally, the record reveals that on January 19, 2007, the San Diego District Attorney's Office filed a felony complaint against Respondent for violations of Cal. Health & Safety Code § 11173(a) (obtaining prescriptions by fraud or deceit) and Cal. Penal Code § 459 (burglary). (Gov't Ex. 8.) On April 17, 2007, Respondent pleaded guilty to a felony count of obtaining a narcotic drug (OxyContin) by means of a forged prescription, in violation of California Health & Safety Code § 11368. (Gov't Ex. 9.) The court deferred entry of judgment for eighteen months and ordered Respondent to enroll in and complete a California Penal Code § 1000 drug treatment program. (Gov't Ex. 10.) On October 22, 2008, the court dismissed the felony criminal complaint against Respondent. (Gov't Exs. 11 & 12.)

III. Respondent's Evidence

Respondent testified at hearing and also presented testimony from her father, Mr. William Mayer. Respondent credibly testified in substance that she became a registered nurse in 1995 and candidly admitted to the fact that she became addicted to prescription medications and was ''guilty of egregious behavior when I made unprofessional choices that led to my chemical dependence.'' (Tr. 44.)

Respondent explained that in or about 1990 she began having migraine headaches ''and saw many health practitioners for this problem, and tried every therapy that was recommended.'' (Tr. 45.) In 2000 her neurologist began prescribing different narcotic medications such as OxyContin, Vicodin, Actiq and Dilaudid for maintenance and rescue therapy. (Tr. 45.) Respondent stated the medications helped initially but did not resolve the migraine headaches, and she was prescribed more of the same narcotic or larger doses over time. (Tr. 45–46.) Respondent also testified that she experienced a series of very difficult life events which increased her stress,[6] and the migraine headaches grew worse. (*See, e.g.,* Tr. 46.)

Respondent next testified that she attempted to discuss her concern that she was becoming addicted to narcotics with her treating physician, but the physician did not believe that intervention was warranted. (Tr. 46.) Responded admitted that she ''eventually betrayed his trust'' by forging his name to acquire more narcotics, but that not ''long after, I called a therapist I had recently been seeing, and told him what I had done, and asked for help.'' (Tr. 46.)

Respondent testified that she started an outpatient drug treatment program on December 21, 2006, and completed the program on February 8, 2007. (Tr. 46.) Thereafter, Respondent completed a year-long aftercare program running between February 8, 2007 and February 2008. (Tr. 46.) From April 2007 to February 2009, Respondent participated in the BRN Nursing Diversion Program, but was dismissed on the grounds that she ''admitted a patient to the hospital ward, and the computer admission orders included orders for [o]xycodone.'' (Tr. 46–47.) Respondent was told that this was equivalent to dispensing oxycodone. (Tr. 47.) In mitigation, Respondent testified that ''I have not dispensed medications in over ten years, and the orders were part of a standardized set for all cancer patients.'' (Tr. 47.)

With regard to the circumstances of Respondent's dismissal from the BRN Nursing Diversion Program, the evidence also included the following factual information:

> Respondent successfully participated in the Nursing Diversion Program for 22 months when she was asked to leave the program because of a technical violation of the Diversion Program's rules. While in the Diversion Program, respondent was working as a Nurse Practitioner in the bone marrow transplant unit at the University of California, San Diego (UCSD) Medical Center. When patients were admitted to the unit, respondent, using a preprogrammed computer check sheet, admitted the patients by checking the appropriate admission box that appeared on the computer screen. By checking the box, the computer program automatically issued a standard set of admission orders. In some instances, the set orders included an order for the patient to receive Oxycodone. Consequently, when the fact respondent had been ''prescribing'' Oxycodone came to the attention of the Diversion Program, respondent was asked to leave even though she had been in full compliance with the strict Diversion Program requirements, including: Calling every morning between 6 and 7 a.m.; taking random drug tests several times per month with no ''dirty'' tests; turning in monthly paperwork on time; attending AA and NA meetings five to seven days per week; attending weekly nurse-to-nurse meetings; completing 16 CEU's on substance abuse; calling monthly to check in with her case manager; and always getting permission before leaving San Diego.
>
> (Resp't Ex. 1 at 4.)

Respondent's father, Mr. Mayer, credibly testified in part and in substance that he is a retired Certified Public Accountant, and lives approximately three miles from Respondent, seeing her at least weekly. (Tr. 81.) Mr. Mayer testified to what he described as a ''double whammy'' inflicted on Respondent by her treating physician and two drug companies, explaining that Respondent's treating physician ''prescribed OxyContin and Actiq for [Respondent's] migraine headaches, although her stresses were far beyond migraine headaches at that time.'' (Tr. 70.) Mr. Mayer further explained that prescribing ''OxyContin, which was marketed as less addictive and less subject to abuse, when it was not, and Actiq, which the FDA had only approved for cancer patients'' in combination to treat Respondent's migraine headaches, significantly contributed to Respondent becoming

[4] Government Exhibit 6 duplicates Respondent Exhibit 7 at 3.

[5] Government Exhibit 7 duplicates Respondent Exhibit 7 at 4.

[6] As the BRN succinctly summarized, Respondent ''was going through a tumultuous divorce, a death in the family, caring for her child, and she was the victim of criminal voyeurism.'' (Resp't Ex. 1 at 3.)

addicted. (Tr. 76–77.) Mr. Mayer also testified that Respondent has put the issues that contributed to her addiction behind her and has been drug free since her sobriety date of November 29, 2006.[7] (Tr. 80.) In terms of Respondent's current state of mind regarding use of medications, Mr. Mayer testified to a February 2010 emergency room visit by Respondent for an acute illness causing pain during which Respondent refused to accept pain medication such as morphine or Dilaudid for fear of becoming addicted again. (Tr. 79.)

Respondent's documentary evidence included, *inter alia,* an April 7, 2010 Proposed Decision (Proposed Decision) of an ALJ of the California BRN. The Proposed Decision ordered Respondent's Registered Nurse License, Nurse Practitioner Certificate, Nurse Practitioner Furnisher Certificate and Health Nurse Certificate revoked, but stayed the revocation and placed Respondent on probation for two (2) years with specified terms and conditions. (Resp't Ex. 1 at 6–7.) The Proposed Decision followed a March 29, 2010 administrative hearing regarding the July 31, 2009 Accusation filed by the BRN, alleging four causes of discipline against Respondent. (*See* Gov't Ex. 13.) In that proceeding, the BRN had requested that Respondent be placed on probation for three years with terms and conditions; the ALJ, however, concluded that two years probation was adequate ''in view of the substantial evidence of rehabilitation and sobriety presented by'' Respondent. (Resp't Exs. 1 at 6.)

Respondent also submitted a September 6, 2008 Certificate of Attendance reflecting successful completion of eight hours of continuing education in Pharmacology In Addiction and eight hours in Relapse Prevention. (Resp't Ex. 3.) Respondent also submitted letters dated September and August 2009 from two friends and colleagues, Linda Long, R.N., M.S.N., F.N.P., and Linnea Trageser, N.P., both attesting to Respondent's professionalism and qualifications to practice. (Respt' Ex. 4 at 1–4.) A September 2009 letter from Respondent's parents thoughtfully describes Respondent's addiction to prescription medications, including the causes, as well as her successful efforts at rehabilitation and continued abstinence. (Resp't Ex. 4 at 5.) A March 11, 2010 letter of personal reference from Alison McManus, Family Nurse Practitioner, a friend of Respondent and her co-worker from April to November 2009, describes Respondent as ''always professional'' and ''punctual and reliable, organized, efficient, and competent.'' (Resp't Ex. 5 at 1.) Three other letters dating from February 2008 to February 2009, written by a former student, supervisor and co-worker, respectively, refer to Respondent as a dedicated professional and ''inspirational role model.'' (*Id.* at 2–4.) A September 1, 2009 letter from a friend and ''sponcee'' at Alcoholics Anonymous (AA) credibly describes Respondent's acceptance of responsibility for her actions as well as Respondent's demonstrated willingness to change her behavior. (Resp't Ex 8 at 2.)

The record reflects that on September 10, 2007, Respondent was recertified as an Acute Care Nurse Practitioner, effective September 1, 2007, to August 31, 2012. (Resp't Ex. 6.)

Letters dated March 25, 2008, and September 9, 2009, from Steven F. Bucky, PhD, Clinical Psychologist, report in relevant part that Respondent has been seen in psychotherapy for approximately two years and ''is progressing well with no evidence of drug, alcohol, or prescription drug use.'' (Resp't Ex. 7 at 1–2.)

A July 5, 2007 letter by Dr. Marina Katz, M.D., documents a June 18, 2007 psychiatric evaluation of Respondent. The report assesses Respondent's opiate dependence and finds that it is in remission, noting that Respondent is active in Narcotics Anonymous (NA), and cautiously gives Respondent a favorable prognosis. (Resp't Ex. 7 at 5–6.)

A September 4, 2008 letter from Kristine M. Vickery, R.N., Facilitator of the San Diego Nurse to Nurse peer support group, notes Respondent's weekly attendance at the support group since April 2007, describing Respondent as a ''determined, motivated individual who is genuinely committed to recovery from chemical dependency.'' (Resp't Ex. 8 at 1.) The letter further notes Respondent's ''sobriety date is November 29, 2006 and she maintained negative drug/ETG tests since her entrance into the [Nursing] Diversion Program. Additionally, a hair follicle test was performed in June 2007, and it was negative, as well.'' (*Id.*)

Discussion

I. The Applicable Statutory Provisions

The Controlled Substances Act (CSA) provides that any person who dispenses (including prescribing) a controlled substance must obtain a registration issued by the DEA in accordance with applicable rules and regulations.[8] ''It shall be unlawful for any person knowingly or intentionally to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.''[9] ''A separate registration shall be required at each principal place of business or professional practice where the applicant * * * dispenses controlled substances.''[10] DEA regulations provide that any registrant may apply to modify her registration to change her address but such modification shall be handled in the same manner as an application for registration.[11]

It is unlawful for any person to possess a controlled substance unless that substance was obtained pursuant to a valid prescription from a practitioner acting in the course of professional practice.[12]

A. The Public Interest Standard

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny an application for a DEA COR if she determines that such registration would be inconsistent with the public interest. In determining the public interest, the Deputy Administrator is required to consider the following factors:

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

(2) The applicant's experience in dispensing, or conducting research with respect to 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.

As a threshold matter, the factors specified in Section 823(f) are to be considered in the disjunctive: The Deputy Administrator may properly rely on any one or a combination of those factors, and give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied.[13]

[7] Although I find Mr. Mayer's testimony credible, I do note a disparity between the November 29, 2006 sobriety date he and others identified (*see* Tr. 80; *see also* Resp't Ex. 8 at 1), and DI Bartolomeo's testimony suggesting that Respondent forged a prescription as late as December 6, 2006 (Tr. 27; *see* Gov't Ex. 2 at 28).

[8] 21 U.S.C. 822(a)(2).

[9] 21 U.S.C. 843(a)(3).

[10] 21 U.S.C. 822(e).

[11] *See* 21 CFR 1301.51 (2010)

[12] 21 U.S.C. 844(a).

[13] *See Henry J. Schwarz, Jr., M.D.,* 54 FR 16,424 (DEA 1989).

B. Other Factors

In addition to the public interest factors discussed above, 21 U.S.C. 824(a) provides four other factors that the Deputy Administrator may consider in a proceeding to suspend or revoke a DEA COR.[14] Despite the lack of an explicit provision applying these factors to a denial of an application [t]he agency has consistently held that the Administrator may also apply these bases to the denial of a registration, since 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.[15] In addition, I conclude that the reference in § 823(f)(5) to ''other conduct which may threaten the public health and safety'' would as a matter of statutory interpretation logically encompass the factors listed in § 824(a).[16]

II. The Factors To Be Considered

Factor 1: The Recommendation of the Appropriate State Licensing Board

As described in the Evidence and Incorporated Findings of Fact Section of this Recommended Decision, Respondent holds active state authority [17] in California as a mid-level practitioner, which has been the subject of prior disciplinary action. (*See, e.g.,* Gov't Ex. 13.) The gravamen of the misconduct which formed the basis of the California BRN Accusation filed on July 31, 2009, related solely to Respondent's actions between June 2006 and December 2006, which were attributable to an addiction to prescription pain medications. (*See* Gov't Ex. 13 at 6–7.)

The evidence at hearing reflects that the BRN complaint against Respondent was the subject of a March 29, 2010 California administrative hearing, during which the BRN recommended that Respondent be placed on a three-year period of probation, with specified terms and conditions. (*See* Resp't Ex. 1 at 6.) The April 7, 2010 Proposed Decision of the state ALJ concluded that cause for discipline exists under applicable California law, finding that Respondent committed acts of unprofessional conduct by possession and use of Schedule II controlled substances without valid prescriptions; and that Respondent forged prescriptions for controlled substances using a prescription pad stolen from a physician. (Resp't Ex. 1 at 5–6.)

In mitigation, the Proposed Decision ordered revocation of Respondent's state nursing licenses, but stayed the revocation and placed Respondent on probation for two years, with specified terms and conditions. (Resp't Ex. 1 at 6–7.) Of note, the state ALJ found substantial evidence of Respondent's rehabilitation and sobriety, concluding that two rather than three years of probation would be ''adequate for the board to monitor respondent to ensure public protection.'' (Resp't Ex. 1 at 6.) On December 28, 2010, the BRN issued a Decision After Non-Adoption, which was consistent with the Proposed Decision, except it further reduced the period of probation to one year and reduced Respondent's costs to zero. (Gov't Br. at Gov't Ex. 17.) [18]

The most recent action by the California BRN reflects a determination that notwithstanding findings of unprofessional conduct, Respondent can be entrusted with an active license subject to probationary terms and conditions. While not dispositive,[19] I find the careful deliberations and action by the state licensing authorities weigh in favor of a finding that Respondent's registration would be consistent with the public interest under 21 U.S.C. 823(f).

Factor 3: Respondent's Conviction Record

As noted above, one of the factors in determining whether Respondent's registration would be inconsistent with the public interest is ''[t]he applicant's conviction record under Federal or state laws relating to the manufacture, distribution, or dispensing of controlled substances.'' 21 U.S.C. 823(f)(3).[20] The OSC alleges that Respondent pled ''guilty to a felony count of obtaining a narcotic drug (OxyContin) by means of a forged prescription, in violation of California Health & Safety Code § 11368.'' (ALJ Ex. 1 at 2.) Pursuant to applicable state law,[21] the entry of judgment was deferred and upon successful completion of a treatment program, the charges were dismissed. (Gov't Ex. 11.) The California statute provides in pertinent part that a ''defendant's plea of guilty pursuant to this chapter shall not constitute a conviction for any purpose,'' unless judgment of guilt is entered.[22] But even the clearest statement of state law is not controlling on the question of what constitutes a ''conviction'' pursuant to the federal CSA. The question therefore remains whether Respondent's plea of guilty, which was ultimately dismissed, constitutes a ''conviction'' on the facts of this case.

Federal case law has established that ''[a] conviction *alone* is sufficient to allow the Attorney General (through the DEA Administrator) to revoke or suspend a DEA registration.'' *Pearce* v. *DEA,* 867 F.2d 253, 255 (6th Cir. 1988) (citing *Fitzhugh* v. *DEA,* 813 F.2d 1248, 1253 (DC Cir. 1987)). Agency precedent takes an expansive view of what constitutes a ''conviction.'' ''The law is well settled that a DEA registrant may be found to have been 'convicted' within the meaning of the Controlled Substances Act, despite a deferred adjudication of guilt.'' *Harlan J. Borcherding, D.O.,* 60 FR 28796–01, 28798 (DEA 1995) (citing *Mukand Lal Arora, M.D.,* 60 FR 4447, 4448 (DEA 1995) (fine, two years of probation and deferred adjudication deemed sufficient), *Clinton D. Nutt, D.O.,* 55 FR 30,992, 30,992 (DEA 1990) (nolo contendere plea and deferred adjudication of guilt deemed sufficient) and *Eric A. Baum, M.D.,* 53 FR 47,272, 47,272 (DEA 1988) (''best interest'' plea, probation, drug counseling and withholding of adjudication deemed sufficient)).

The policy underlying this precedent is founded in the doctrine of claim preclusion. ''When the judge decided to withhold adjudication and sentence and instead placed the defendant on probation * * * it is clear that the defendant could no longer be tried on the information.'' *United States* v. *Cook,*

[14] That subsection provides that a DEA COR may be revoked upon a finding that the registrant: (1) Has materially falsified an application; (2) has been convicted of a felony under the CSA or any other federal or state law relating to any controlled substance; (3) has had a state license or registration suspended, revoked or denied and is no longer authorized by state law to handle controlled substances; (4) has committed such acts as would render his registration under 21 U.S.C. 823 inconsistent with the public interest; or (5) has been excluded from participation in incorporating the public interest factors from § 823(f). *See* 21 U.S.C. 824(a)(4).

[15] *Kuen H. Chen, M.D.,* 58 FR 65,401, 65, 402 (DEA 1993) (citing *Serling Drug co. & Detroit Prescription Wholesaler, Inc.,* 40 FR 11,918, 11,919 (DEA 1975)); *accord Scott J. Loman, D.D.S.,* 50 FR 18,941 (DEA 1985); *Roger Lee Palmer, D.M.D.,* 49 FR 950 (DEA 1984).

[16] *See Chen,* 58 FR at 65,402.

[17] Registered Nurse Licdense No. 513926; Nurse Practitioner Certificate No. 12026; Nurse Practitioner Furnisher Certificate No. 12026; Public Health Nurse Certificate No. 55127.

[18] *See supra* note 3.

[19] *Mortimer B. Levin, D.O.,* 55 FR 8209, 8210 (DEA 1990) (finding DEA maintains separate oversight responsibility and statutory obligation to make independent determination whether to grant registration).

[20] I note that 21 U.S.C. 824(a)(2) (factor considering whether registrant ''has been convicted of a felony under the Controlled Substances Act or any other federal or state law relating to any controlled substance'') was not cited in either the OSC or otherwise noticed prior to hearing, and therefore is not applicable to this Recommended Decision. *See CBS Wholesale Distribs.,* 74 FR 36,746, 36,749 (DEA 2009).

[21] Cal. Penal Code 1000.1.

[22] *Id.* § 1000.1(d).

10 M.J. 138, 139 (U.S. Ct. Mil. App. 1981) (cited, but not quoted, in *Eric A. Baum, M.D.,* 53 FR 47,272 (DEA 1988)). Accordingly, a registrant whose criminal adjudication has been deferred is nevertheless considered to have been ''convicted'' under DEA precedent.

In this case, the fact that a finding of guilt was specifically not entered as to Respondent and the charges dismissed, leaves open the question as to whether the foregoing Agency precedent is controlling on the issue of whether Respondent's plea constitutes a conviction under 21 U.S.C. 823(f).[23] It is unnecessary to reach that issue, however, because the underlying offense to which Respondent pled guilty does not ''relate[ ] to the manufacture, distribution, or dispensing of controlled substances,'' the standard embraced in § 823(f). *See Super-Rite Drugs,* 56 FR 46,014, 46,015 (DEA 1991) (''Although [applicant] entered a guilty plea to a drug-related felony, his actions did not relate to the manufacture, distribution, or dispensing of controlled substances.'').

Accordingly, I find that Respondent has not been convicted of any laws relating to the manufacture, distribution or dispensing of controlled substances. I therefore find that Factor Three under Section 823(f), while not dispositive, does weigh in favor of a finding that Respondent's registration would be consistent with the public interest.

Factors 2, 4 and 5: Respondent's Experience in Dispensing Controlled Substances; Compliance With Applicable State, Federal or Local Laws Relating to Controlled Substances; and Such Other Conduct Which May Threaten the Public Health and Safety

The central issue in this case centers on Respondent's addiction to prescription pain medications, which began in or about 2006 while under medical care for chronic migraine headaches. (*See* Tr. 45–46.) Respondent's use of prescription pain medications eventually culminated in a course of conduct between June 2006 to December 2006, where she forged approximately nine prescriptions for Schedule II controlled substances for herself using a stolen prescription pad (*see, e.g.,* Tr. 24–26, 46), and wrongfully used and possessed Schedule II controlled substances (*e.g.,* Gov't Ex. 13 at 6). Other than the time period from June to December 2006, with a single exception noted below, there is no evidence that Respondent has failed to comply with all applicable laws and regulations relating to controlled substances during her professional career.

As to the single instance of Respondent's noncompliance with controlled substance laws following her sobriety date, there is evidence of record that Respondent was dismissed in February 2009 from a Nursing Diversion Program, during her employment as a nurse practitioner in a bone marrow transplant unit, on the grounds that a computer-generated admission order for a patient automatically included an order for oxycodone. (*E.g.,* Resp't Ex. 1 at 4.) Respondent was informed that she was being dismissed because this admission order, which included an order for oxycodone, was considered the equivalent to dispensing oxycodone. (Tr. 47.) Respondent credibly testified that she had ''not dispensed medications in over ten years, and the orders were part of a standardized set for all cancer patients.'' (Tr. 47.) Additionally, the evidence reflects that as of February 2009, Respondent had successfully participated in the Nursing Diversion Program for approximately twenty-two months and had been in full compliance with other strict requirements to include random drug tests, all of which were negative. (Resp't Ex. 1 at 4.)

As an initial matter, the issue of Respondent's dismissal from the Nursing Diversion Program due to improper dispensing of oxycodone was not specifically noticed by the Government in the OSC or prehearing statement, nor was it referenced in any Government exhibits prior to hearing. The issue was introduced by Respondent at hearing during her direct testimony as well as in documentary evidence. (Tr. 47; Resp't Ex. 1 at 4.)

To comport with due process requirements, the DEA must ''provide a Respondent with notice of those acts which the Agency intends to rely on in seeking the revocation of [her] registration so as to provide a full and fair opportunity to challenge the factual and legal basis for the Agency's action.'' *CBS Wholesale Distribs.,* 74 FR 36,746, 36,749 (DEA 2009) (citing *NLRB* v. *I.W.G., Inc.,* 144 F.3d 685, 688–89 (10th Cir. 1998) and *Pergament United Sales, Inc.,* v. *NLRB,* 920 F.2d 130, 134 (2d Cir. 1990)). An issue cannot be the basis for a sanction when the Government has failed to ''disclose 'in its prehearing statements or indicate at any time prior to the hearing' that an issue will be litigated.'' *Id.* at 36,750 (citing *Darrell Risner, D.M.D.,* 61 FR 728, 730 (DEA 1996)). The DEA has also previously found, however, that a respondent may waive objection to the admission of evidence not noticed by the Government prior to the hearing when the respondent does not timely object and when the respondent also raises the issue. *Gregory D. Owens, D.D.S.,* 74 FR 36,751, 36,755 (DEA 2009).

In accordance with agency precedent, I find in this case that the issue of Respondent's February 2009 dispensing of oxycodone may properly be considered in evaluating Respondent's application, as well as on the issue of sanction. I also find that Respondent's conduct culminating in the single instance of dispensing oxycodone in February 2009 was inadvertent. The record reveals that

> [w]hen patients were admitted to the unit, respondent, using a preprogrammed computer check sheet, admitted the patients by checking the appropriate admission box that appeared on the computer screen. By checking the box, the computer program automatically issued a standard set of admission orders. In some instances, the set orders included an order for the patient to receive [o]xycodone.

(Resp't Ex. 1 at 4.) The circumstances of this single incident and Respondent's early termination from the Nursing Diversion Program after approximately twenty-two fully successful months does not weigh against Respondent's application for DEA registration. I also note that as with all other aspects of Respondent's testimony, Respondent was fully credible and candid in her explanation of this incident.

The Government maintains that Factors Four and Five are relevant to the public interest inquiry, relying in part on the undisputed evidence of Respondent's history of self-abuse of controlled substances, and citing *Gary E. Stanford, M.D.,* 58 FR 14,430 (DEA 1993) and *William L. Pigg, M.D.,* 55 FR 3120 (DEA 1990), cases finding a registrant's abuse of controlled substances and alcohol relevant to the public interest inquiry.

In *Stanford,* the evidence of abuse included ''a history of abuse of alcohol, recreational use of cocaine, and other controlled substances for other than a legitimate medical purpose over several years'' and concerned a registrant in the ''early months of recovery.'' *Stanford,* 58 FR at 14,432. Of note, the ALJ's recommended decision in *Stanford,* which the Agency adopted in its entirety, ''recommended that if after the passage of one year from the final disposition of the case, [r]espondent files a new application for registration,

[23] Agency precedent as embodied in *Baum* and other cases, carried to its logical conclusion, could arguably deem a plea that was later withdrawn, and a defendant found not guilty after trial, to be a conviction, on the claim preclusion grounds discussed in *United States* v. *Cook,* 10 M.J. 138, 139 (U.S. Ct. Mil. App. 1981), a case cited favorably in *Baum. Cf. Baum,* 53 FR at 47,274.

and if his rehabilitation efforts have continued successfully, investigation of that application should be expedited, and favorable consideration should be given to the application.'' *Id.* In *Pigg,* a case in which the respondent waived hearing and the Agency issued a final decision on grounds of lack of state authority, as well as drug abuse, the facts relating to substance abuse included abuse of cocaine and alcohol over at least a two-year period, along with a subsequent abuse of alcohol and controlled substances following entry to an Impaired Physicians Program. *Pigg,* 55 FR at 3120.

Other cases reflect long-held ''precedent that a practitioner's self-abuse of controlled substances constitutes 'conduct which may threaten public health and safety.''' *Steven B. Brown, M.D.,* 75 FR 65,660, 65,662 (DEA2010) (citing *Tony T. Bui, M.D.,* 75 FR 49,979, 49,990 (DEA 2010); *Kenneth Wayne Green, Jr., M.D.,* 59 FR 51,453 (DEA 1994); *David E. Trawick, D.D.S,* 53 FR 5326 (DEA 1988). In *Brown,* the evidence of self-abuse spanned approximately a two year period during which the registrant prescribed 160–180 tablets of oxycodone 30 mg monthly to a patient in exchange for return of half of the controlled substances. *Brown,* 75 FR at 65,661. Additional evidence included a finding that the registrant was a drug abuser and a threat to public health and safety, when he offered the patient ''a hit of liquid oxycodone.'' *Id.* at 65,662.

In the instant case, the evidence is undisputed that Respondent's conduct between approximately June and December 2006 violated federal and state law and reflected a serious drug addiction by Respondent during that time period of approximately six months.[24] The evidence includes approximately nine instances of Respondent forging prescriptions using a stolen prescription pad, resulting in the acquisition of approximately 115 tablets of fentanyl and 120 tablets of oxycontin. (Gov't Exs. 2 & 3.) The evidence further reflects that Respondent's addiction had progressed to the point where she would dissolve ''the Actiq [fentanyl] in a saline solution and inject herself with it.'' (Gov't Ex. 13 at 6.)

Additionally, the evidence regarding Respondent's acknowledgement of her addiction includes a December 18, 2006 interview at the San Diego Bureau of Narcotics Enforcement office, where Respondent initially denied forging any prescriptions, but eventually admitted that she had stolen the prescription pad and forged prescriptions for OxyContin and Actiq.[25] (Gov't Ex. 4; Gov't Ex. 13 at 6.) There is other evidence suggesting Respondent was already attempting to seek help on her own, including Respondent's testimony that not long after forging prescriptions ''I called a therapist I had recently been seeing, and told him what I had done, and asked for help.'' (Tr. 46.)

To summarize, Respondent's admitted misconduct and substance abuse between June and December 2006, if viewed standing alone, does weigh against a finding that Respondent's unconditional registration would be consistent with the public interest under Factors Four and Five.

Conclusion and Recommendation

After balancing the foregoing public interest factors, I find the Government has established by substantial evidence a *prima facie* case in support of denial of Respondent's application for registration, based on Respondent's unlawful possession, use and fraudulent acquisition of controlled substances between June and December 2006. Once DEA has made its *prima facie* case for revocation, the burden then shifts to the respondent to show that, given the totality of the facts and circumstances in the record, denial of the application would not be appropriate. *See Morall* v. *DEA,* 412 F.3d 165, 174 (DC Cir. 2005); *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *United States Dep't of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 FR 72, 311 (DEA 1980).

Additionally, where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his or her actions and demonstrate that he or she will not engage in future misconduct. *Patrick W. Stodola, M.D.,* 74 FR 20,727 (DEA 2009). Also, ''[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest.'' *Joseph Gaudio, M.D.,* 74 FR 10,083, 10,094 (DEA 2009).

In the instant case, Respondent's testimony at hearing with regard to her past misconduct, and demonstrated efforts to avoid a repeat of those mistakes, was fully credible. Respondent's testimony was consistent and candid throughout her direct and cross examination. With regard to the facts surrounding her misconduct, Respondent credibly assumed full responsibility for her actions, stating at the outset of her testimony that ''I was guilty of egregious behavior when I made unprofessional choices that led to my chemical dependence.'' (Tr. 44.) The Government argues that Respondent ''appeared to accept responsibility,'' but that ''her father attempted to shift the blame for Respondent's addiction to her physician and two drug manufacturers.'' (Gov't Br. at 5.) The relevant inquiry, however, is Respondent's own acceptance of responsibility, not that of a third party.[26]

The evidence and testimony demonstrating Respondent's efforts to ensure that she will not engage in future misconduct relating to drug addiction is substantial and compelling. The Government ''contends that Respondent needs additional time to demonstrate she can remain free from drug abuse and to solidify her recovery.''[27] The facts reflect that Respondent has been free from drug abuse for over four years (*compare* Gov't Exs. 6 & 7, *with* Tr. 44–46, Tr. 80, *and* Resp't Ex. 1 at 4) and the time period of her abuse covered a relatively short time of approximately six months.[28] The passage of time and significant efforts at rehabilitation are relevant and weighty considerations. *See Sokoloff* v. *Saxbe,* 501 F.2d 571 (2d Cir. 1974) (passage of time requires careful consideration of new application); *see also Azen* v. *DEA,* 1996 WL 56114 at *2 (9th Cir. Feb. 9, 1996) (impressive evidence of rehabilitation and continued abstinence important consideration). The evidence also reflects that Respondent admitted her addiction to a therapist in late 2006 (Tr. 46) and timely cooperated with authorities in December 2006 when

[24] *Compare* Tr. 46, *with* Tr. 27, *and* Gov't Ex. 2 at 9, 14, 16, 18, 20, 22, 24, 26, & 28 (forged prescriptions ranging between August 9, 2006, and December 6, 2006).

[25] This evidence is somewhat consistent with testimony of DI Bartolomeo with regard to Respondent's confession on December 18, 2006, although DI Bartolomeo did not reference Respondent's initial denial. (*See, e.g.*, Tr. 29.) For instance, the record was unclear whether Respondent made two separate admissions on December 18, 2006. Notwithstanding the ambiguity and intial denial, I find that Respondent's admission of misconduct and cooperation with law enforcement authorities was timely and is to her credit.

[26] Even assuming the testimony of a third party might be relevant in some circumstances to whether a respondent has accepted responsibility, such as, for example, to impeach a respondent's credibility, I find Respondent's father's testimony in this case to be fully consistent with Respondent's acceptance of responsibility. In explaining the circumstances and context of Respondent's addiction, Respondent's father concluded by stating ''I believe * * * that forging prescriptions is a serious offense, especially by someone who has been granted a DEA certificate. But the circumstances which caused * * * this are far behind her,'' credibly enumerating the specific positive changes in his daughter's life. (Tr. 77.)

[27] Gov't Br. at 6.

[28] *Supra* note 24.

confronted with allegations of misconduct (Gov't Ex. 13 at 6), behavior which weighs in Respondent's favor. *See Karen A. Kruger, M.D.,* 69 FR 7016, 7017–18 (DEA 2004) (timely cooperation with investigators when questioned on past misconduct held a significant consideration in granting subsequent application for registration).

Respondent's abstinence from drug abuse since 2006, and her efforts at rehabilitation have been consistent, substantial, and successful. The uncontroverted evidence of rehabilitation shows that Respondent: successfully completed a seven-week outpatient alcohol and drug treatment program (Gov't Ex. 6); successfully completed a one-year dependency aftercare program (Gov't Ex. 7); successfully participated in a Nursing Diversion Program for twenty-two months (Resp't Ex. 1 at 4); regularly attended AA and NA meetings (Resp't Ex. 7 at 5–6; Resp't Ex. 8 at 2); regularly attended nurse-to-nurse meetings (Resp't Ex. 1 at 4); and has had sustained sobriety since December 2006, as evidenced by repeated negative random drug tests (*see* Resp't Ex. 1 at 4), *inter alia.* Credible and unrebutted testimony even reveals that Respondent went as far as avoiding medically indicated pain medication in 2010, just to avoid any potential for relapse. (Tr. 79.) In addition to the foregoing, the record is replete with credible evidence from family, friends, colleagues, students, treating sources and mentors, all consistently attesting to Respondent's sustained recovery and abstinence from prescription drug abuse. In light of the significant evidence of rehabilitation and ongoing monitoring by the California BRN, I find Respondent has sustained her burden in accepting responsibility and demonstrated that she has taken the necessary steps to avoid a repeat of her mistakes. Granting Respondent's application for a COR, subject to conditions, is fully consistent with the public interest.

Accordingly, I recommend that Respondent's application for DEA COR be granted, subject to the following conditions: (1) Respondent shall comply with all of the terms and conditions specified in the December 28, 2010 Order of the California BRN (*see* Gov't Br. at Gov't Ex. 17); and (2) for one (1) year following the issuance of a final order in this proceeding, Respondent shall upon request, submit to the nearest Field Division Office of DEA, copies of the results of any random or directed drug screening tests involving Respondent.

Dated: February 4, 2011.

Timothy D. Wing,

Administrative Law Judege.

[FR Doc. 2011–25238 Filed 9–29–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection, Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed extension of the ''Mass Layoff Statistics Program.'' A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section of this notice on or before November 29, 2011.

ADDRESSES: Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Carol Rowan, BLS Clearance Officer, at 202–691–7628 (this is not a toll free number). (See **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

Section 309(2)(15)(a)(1)(A)(iii) of the Workforce Investment Act (WIA) states that the Secretary of Labor shall oversee development, maintenance, and continuous improvements of the program to measure the incidence of, industrial and geographical location of, and number of workers displaced by, permanent layoffs and plant closings. Prior to the WIA, Section 462(e) of Public Law 97–300, the Job Training Partnership Act (JTPA), provided that the Secretary of Labor develop and maintain statistical data relating to permanent mass layoffs and plant closings and issue an annual report. The report includes, at a minimum, the number of plant closings and mass layoffs, and the number of workers affected. The data are summarized by geographic area and industry.

The Mass Layoff Statistics (MLS) program uses a standardized, automated approach to identify, describe, and track the impact of major job cutbacks. The program utilizes, to the greatest degree possible, existing Unemployment Insurance (UI) records and computerized data files, supplemented by direct employer contact. Its major features include:

- The identification of major layoffs and closings through initial UI claims filed against the identified employer;
- The use of existing files on claimants to obtain basic demographic and economic characteristics on the individual;
- The telephone contact of those employers meeting mass layoff criteria to obtain specific information on the nature of the layoff and characteristics of the establishment;
- The identification of the continuing impact of the mass layoff on individuals by matching affected initial claimants with persons in claims status;
- The measurement of the incidence of the exhaustion of regular state UI benefits by affected workers;
- The identification and quantifying the effects that extended mass layoffs have on the movement of work; and,
- The identification of business functions within establishments which are affected by mass layoffs.

In the program, State Workforce Agencies (SWAs) submit one report each quarter and a preliminary, summary report each month. These computerized reports contain information from State administrative files and information obtained from those employers meeting the program criteria of a mass layoff.

Congress provided for the implementation of the MLS program by the Bureau of Labor Statistics (BLS) through the Fiscal Years 1984–1992 appropriations for the Departments of Labor, Health and Human Services, Education, and related agencies. The program was not operational in Fiscal Years 1993 and 1994. Program operation