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 the application for DEA Certificate of Registration submitted by Scott H. Nearing, D.D.S. be, and it hereby is, granted, subject to the above described restrictions. This order is effective July 7, 2005.

Dated: May 25, 2005.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. 05–11251 Filed 6–6–05; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 02–28]

Felix K. Prakasam, M.D. Revocation of Registration

On February 6, 2002, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Felix K. Prakasam, M.D. (Respondent) notifying Respondent of an opportunity to show cause as to why DEA should not revoke his DEA Certificates of Registration BP3420344 and BP44160029, pursuant to 21 U.S.C. 824(a)(1) and (a)(4) on the grounds he had materially falsified four DEA renewal applications and that his continued registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a)(4). The Order to Show Cause also proposed that any pending applications for renewal should be denied under 21 U.S.C. 823(f).

The Order to Show Cause alleged, in sum, that during 1995–1996, Respondent failed to maintain complete and accurate records of controlled substances dispensed at this medical offices located in Redlands and Salinas, California, and accountability audits during this period revealed overages and shortages of controlled substances at both registered locations. As a result, on March 10, 1997, after an informal administrative hearing at the DEA San Francisco office, Respondent entered into a Memorandum of Understanding with DEA in which he agreed to address the record-keeping violations and provide effective controls against theft and diversion of controlled substances.

The Order to Show Cause further alleged that on April 30, 1997, the California Medical Board (California Board) brought on Accusation against Respondent's California medical license. As a result, on February 11, 1998, the California Board revoked Respondent's medical license, effective March 13, 1998. However, the Board stayed the revocation, placing Respondent's license on probation for three years, with conditions. On March 20, 2001, as a result of the California action, Respondent entered into a Consent Order with the Louisiana State Board of Medical Examiners (Louisiana Board) in which he agreed to an indefinite suspension of his Louisiana medical license.

Finally, it was alleged that in February 1998 and February 2001, Respondent materially falsified a total of four applications for renewal of his DEA registrations by failing to disclose the California Board's action placing his medical license in a probationary status.

Respondent requested a hearing on the issues raised by the Order to Show Cause and following pre-hearing procedures, a hearing was held in San Francisco, California, on March 12 and 13, 2003. At the hearing, both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties submitted proposed findings of fact, conclusions of law, and argument.

On January 30, 2004, Presiding Administrative Law Judge Mary Ellen Bittner (Judge Bittner/ALJ) issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge (Opinion and Recommended Ruling) in which she recommended that Respondent's two DEA registrations be revoked and any pending applications for renewal denied. No exceptions were submitted by the parties, and on March 2, 2004, Judge Bittner transmitted the record of these proceedings to the then-Acting Deputy Administrator of DEA.

The Deputy Administrator has considered the record in its entirety and pursuant to 21 CFR 1316.67, hereby issues her final order based upon finding of fact and conclusions of law as hereinafter set forth.

The Deputy Administrator adopts the findings of fact and recommendation of the Administrative Law Judge that Respondent's DEA Certificates of Registration be revoked.[1]

The record before the Deputy Administrator shows Respondent received his medical degree in 1971 from Christian Medical College in Vellore, India. He interned and completed a residency in Maryland and in 1981 was licensed to practice in California. He also practiced medicine in Louisiana from an undetermined date until 1992, when he moved to California and opened a practice in Redlands. He eventually began working in the Salinas office of Rinaldo Fong, M.D. and took over that practice when Dr. Fong was deported. Respondent has held DEA Certificate of Registration BP3420344 for the Redlands location since November 18, 1992, and DEA resignation BP4416029 for the Salinas office since May 8, 1995. While Respondent is Board eligible in anesthesiology, his specialty at all relevant times has been bariatric medicine *i.e.,* weight control.

In July 1996, after reports were received of Respondent's possible purchase of excessive quantities of controlled substances, DEA Diversion Investigators, accompanied by an investigator from the California Board, conducted an inspection and accountability audit at Respondent's Salinas office. The inspection revealed Respondent had not complied with multiple regulatory requirements, including failures: (1) Maintain an inventory of controlled substances as of a specific date and as of the opening or closing of business; (2) maintain

[1] In an evidentiary/discovery ruling which did not impact relevant findings of fact or her recommendation for revocation, the ALJ concluded the Government should have provided Respondent copies of several DEA–6 Reports of Investigation which had been prepared by a DEA Diversion Investigator while investigating the allegations, several years before the hearing. Before testifying for the Government, the Diversion Investigator had used the reports to refresh his memory and Respondent's request for the documents was made after the Diversion Investigator completed testifying on direct examination. Notwithstanding the ALJ's ruling, the Government declined to provide Respondent the reports, contending they were not releasable under the rules and statutes governing DEA administrative hearings. Transcript, pages 168–169; Opinion and Recommended Ruling, page 5, fn. 1.

The reports appear to be Jencks Act material (18 U.S.C. 3500) and the Deputy Administrator has previously ruled that ''pursuant to applicable law and regulations governing DEA administrative hearings, neither the principles of the Jencks decision nor the Jencks Act are applicable to these proceedings.'' *See e.g.*, Branex Inc., 69 FR 8,682, 8,685 (2004) (Emphasis added) [Confirming predecessor Deputy Administrator's interlocutory decision that the Government is not required to supply a respondent at an administrative hearing, statements made and adopted by Government witnesses during their direct testimony.]

Applying the principles of Branex and its predecessors, which addressed evidentiary/discovery standards applicable to DEA administrative hearing and detailed the Government's limited obligations to provide discovery before and during the course of hearings under the Administrative Procedures Act (5 U.S.C. 556(d)) and DEA regulations (21 CFR 1316.54–1316.59), the Deputy Administrator concludes the Government correctly declined to provide Respondent the reports in question here. *See e.g.*, Nicholas A. Sychak, d.b.a. Medicap Pharmacy, 65 FR 75,959, 75,960–75,961 (2000) [No requirement for Government to disclose potentially exculpatory information to respondents in DEA administrative hearings]; Rosalind A. Cropper, M.D., 66 FR 41,040, 41,041 (2001) [''the Federal Rules of Evidence do not apply directly to these proceedings'']

addresses of patients to whom Respondent directly dispensed controlled substances or the initials or name of the dispenser; (3) adequately document a return of controlled substances to a supplier; (4) document a transfer of controlled substances between his Redlands and Salinas offices; and (5) retain a purchase invoice.

An accountability audit performed in conjunction with the investigation in July 1996 indicated substantial overages of phentermine 30 mg. and 15 mg. and a substantial shortage of phentermine 37.5. However, Judge Bittner concluded the overages were most likely attributable to the use of a zero opening inventory and did not necessarily indicate diversion.

With regard to the shortage, there was a conflict in the evidence as to whether investigators had inventoried some 48,000 dosage units of phentermine 37.5 mg. which, if counted, would have resulted in an overage of that drug. A second inventory was performed at the Salinas Office on October 29 and 30, 1996, showing a substantial overage of phentermine 37.5 mg. and no significant shortages. Given the numbers, Judge Bittner concluded the second audit's overage indicated the 48,000 units of phentermine 37.5 mg. had actually been on hand in July, but not counted in the first audit.

The Deputy Administrator agrees with Judge Bittner that the record is inadequate to determine whether or not the July 1996 inventory was accurate. Therefore, it cannot be established whether or not Respondent was responsible for the shortage indicated by the first audit.

On February 6, 1997, a Notice of Hearing was issued by DEA informing Respondent an informal hearing would be held in San Francisco on March 10, 1997. The notice alleged the record keeping and regulatory violations from the 1996 DEA investigations. Respondent appeared, represented by counsel, and testified regarding the reasons for the regulatory violations, but disputed the accuracy of the inventories.

On May 8, 1997, Respondent executed a Memorandum of Understanding with DEA's San Francisco Field Division. In that Memorandum Respondent agreed to: (1) Comply with the provisions of the Controlled Substances Act and its implementing regulations at each of his registered locations; (2) take an inventory of controlled substances upon receiving a new DEA registration; (3) maintain dispensing logs that met regulatory requirements; (4) keep complete and accurate records; (5) keep required receiving records; (6) follow drug destruction procedures established by the DEA San Francisco office; and (7) provide effective controls against theft and diversion of controlled substances.

The California Board conducted additional investigations of Respondent and on April 30, 1997, issued an Accusation against Respondent alleging multiple violations, including the matters from the 1996 DEA inquiries. On February 11, 1998, the California Board issued a Decision, effective March 13, 1998, adopting a Stipulated Settlement and Decision (Stipulation) that Respondent and his then-attorney executed on January 5, 1998. In the Stipulation, Respondent waived various rights but did not admit engaging in any of the alleged misconduct.

The Stipulation revoked Respondent's medical license and license to supervise physician assistants, but stayed the revocations and placed his licenses on probation for three years. Among its provisions, the Stipulation required Respondent to take continuing medical education courses and courses in prescribing practices and ethics, to maintain records of all controlled substances he prescribed, dispensed or administered, to make these records available for inspection, to take and pass an oral clinical examination, to have a third party present while examining or treating female patients and to comply with a probation surveillance program.

The Stipulation provided that upon successful completion of probation, Respondent's California licenses would be reinstated. That, in fact, occurred and on May 11, 2001, Respondent was notified he had successfully completed probation. He has since been licensed to practice medicine in California without restriction. The evidence introduced at the DEA hearing indicates that since the 1996 DEA inquiry, he has complied with controlled substance record keeping requirements.

Respondent was also licensed to practice medicine in Louisiana for a period of time prior to 1998, when his license expired. Under Louisiana law, he was entitled to renew the license for a period of four years from its expiration. On Februry 2, 2001, Respondent entered into a Consent Order with the Louisiana Board, in which the Board indefinitely suspended Respondent's entitlement to reinstatement of his Louisiana medical license. It further imposed, as a condition of eventual reinstatement, that Respondent successfully complete all probationary conditions levied by the California Board and obtain an unrestricted license to practice medicine in California. Respondent was also required to notify and appear before the Louisiana Board, prior to seeking renewal or reinstatement of his Louisiana license and he would accept any terms or conditions the Louisiana Board might impose as a condition of reinstatement.

Respondent testified at the DEA hearing that when he signed the Memorandum of Understanding with DEA in May 1997, he understood ''that the matter would be laid to rest at that moment, and never again brought up; but it was not done so.'' He also testified he agreed to settle the California Board proceedings because he paid ''thousands of dollars'' in attorney fees and had no money left. However, he regretted that decision because he considered the allegations to be false. With regard to the Louisiana Consent Order, Respondent testified he signed it because he ''had not desire to go back to Louisiana.''

On February 25 and 28, 1998, Respondent executed renewal applications for the DEA registrations at his Redlands and Salinas locations. On both applications, Respondent checked ''No'' in response to the question, ''Has the applicant even been convicted of a crime in connection with controlled substances under State or Federal law or ever surrendered or had a Federal controlled substance registration revoked, suspended, restricted, or denied or ever had a State professional license or controlled substance registration revoked, suspended, denied, restricted, *or placed on probation or is any such action pending against the applicant?*'' (Emphasis added). An applicant who responds affirmatively to this question is required to explain his answer on the back of the application. Respondent left this space blank on both applications.

On February 27 and 28, 2001, Respondent again executed renewal applications for his Salinas and Redlands offices. These applications included the so-called ''liability questions'' pertaining to individual applicants. Question 3(d) asked, ''Has the applicant *ever* had a state professional license or controlled substance registration revoked, suspended, denied, restricted, *or placed on probation*?'' (Emphasis added). Respondent answered this question in the negative on both applications and left the space for explanations of affirmative answers blank.

In June 2001, a Diversion Investigator from DEA's Riverside office looking into Respondent's February 2001 renewal applications, contacted the California Board and learned that Respondent's medical license for that state had been

placed on probation. In October 2001, the investigator wrote a report concluding Respondent had not truthfully answered the liability questions and recommend initiation of the instant Show Cause proceedings.

Respondent testified at the DEA hearing that when he executed the two February 1998 applications, no discipline had yet taken effect against either his California or Louisiana medical licenses. When asked his understanding of the relevant question, Respondent replied he thought the question applied only to a separate state license to handle controlled substances, such as he had in Louisiana, and that no action had been taken against that license. He further testified he would have expected someone from DEA to contact him if there was a problem with the 1998 applications and that did not occur.

On cross-examination, Respondent acknowledged that as of January 5, 1998, he was aware he was entering into an agreement with the California Board which would result in his California medical license being placed on probation and that the questions on his February 1998 applications referred to *pending* disciplinary actions, in addition to discipline already imposed. Nonetheless, when asked, ''isn't it true that, on February 25, 1998, you were aware that the California Medical Board was going to place [you] on probation?''—Respondent answered, ''Yes, but that's not how I read that.'' Asked further what he thought the correct answer to the application's question was, Respondent replied, ''My opinion would be the correct answer is no.''

Similarly, when asked whether the February 2, 2001, Consent Order with the Louisiana Board resulted in a suspension or probation of his Louisiana medical license, Respondent replied the Consent Order was based on the California settlement and he had agreed not to practice in Louisiana and not renewed his license in that state.

With respect to the two 2001 DEA applications, Respondent testified his answers to question 3(d) were correct because the probationary period for his California medical license had run by that time and he thought the question referred to his controlled substance license, rather than his medical license.

The Controlled Substances Act specifies in 21 U.S.C. 824(a)(1) that the Deputy Administrator may revoke a DEA Certificate of Registration if she finds the registrant has materially falsified any application for DEA registration. The Act also provides in section 824(a)(4) that the Deputy Administrator may revoke a registration if she determines the registrant has committed acts that would render his continued registration inconsistent with the public interest, as that term is determined under 21 U.S.C. 823(f). That section requires the following factors be considered in determining the public interest:

(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 or safety.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight she deems appropriate in determining whether a registration should be revoced or an application for registration denied. See Henry J. Schwartz, Jr., M.D., 54 FR 16,422 (1989).

With regard to the public interest factors, the Deputy Administrator finds, in agreement with Judge Bittner as to factor one, that Respondent has regained his unrestricted license to practice medicine in California and this weighs in favor of continued registration. However, inasmuch as State license is a necessary but not sufficient condition for DEA registration, this factor is not determinative. See Edson W. Redard, M.D., 65 FR 30,616, 30,619 (2000); James C. LaJevic, D.M.D., 64 FR 55,962, 55,964 (1999).

As to factor two, Respondent's experience in handling controlled substances, Judge Bittner concluded that the recordkeeping deficiencies disclosed in the 1996 investigation indicated that continued registration would not be in the public interest. However, with regard to the 1996 audits, Judge Bittner concluded the evidence introduced at the DEA hearing was insufficient to show Respondent responsible for any shortages of controlled substances and thus weighed in favor of continued registration. The Deputy Administrator agrees with these conclusions.

As to factor three, there is no evidence Respondent has ever been convicted of a crime relating to controlled substances.

As to factor four, his compliance with applicable laws relating to controlled substances, Respondent's falsification of the renewal applications and the regulatory violations discussed above, establish he has not complied with the laws relating to controlled substances. The Deputy Administrator agrees with Judge Bittner that this factor weighs against continued registration.

As to factor five, other conduct that may threaten the public health and safety, Judge Bittner noted that, although Respondent committed various regulatory violations prior to 1996, his subsequent recordkeeping apparently complied with DEA regulations. She therefore found this factor weighs in favor of continued registration. The Deputy Administrator agrees.

In sum, Judge Bittner concluded Respondent corrected the recordkeeping deficiencies uncovered in 1996 and under the circumstances, the audit results did not warrant a finding that Respondent mishandled controlled substances during the period July 1995 to October 1996. She concluded that the factors considered pursuant to 21 U.S.C. 832(f), other than those relating to falsification of applications, did not establish that Respondent's continued registration was inconsistent with the public interest under 21 U.S.C. 824(a)(4). The Deputy Administrator agrees revocation is unwarranted under that section.

However, as Judge Bittner concluded, the issue of Respondent's falsification of renewal applications ''is another matter.'' DEA has previously held that in finding there has been a material falsification of an application, it must be determined the applicant knew or should have known that the response given to the liability question was false. See Merlin E. Shuck, D.V.M., 69 FR 22,566 (2004); James C. LaJavic, D.M.D., *supra,* 64 FR 55,962; Martha Hernandez, M.D., 62 FR 61,145 (1997). In that regard, Judge Bittner found Respondent materially falsified four applications for renewal of his DEA registrations.

The two 1998 applications did not refer only to licenses to handle controlled substances, but to ''a state professional license or controlled substance registration,'' and it is clear that applicants were required to report actions against their medical or other professional licenses, both completed and then-pending. Further, although the probation of Respondent's California license did not take effect until March 13, 1998, the disciplinary action was obviously pending on February 25 and 28, 1998, when Respondent executed his applications. Also, regarding the two February 2001 applications, at that time Respondent's California license *had been* on probation and the fact that the

probationary period was over did not justify a negative answer to the question, as it asked whether the applicant ''ever'' had discipline take against a state license.

The Deputy Administrator also agrees with Judge Bittner's conclusions, made after observing Respondent's demeanor, that ''Respondent's explanations for the misstatements and his continued insistence that his answers were correct are disingenuous at best'' and that he materially falsified the applications, which establishes grounds for revoking his registrations under 21 U.S.C. 824(a)(1).[2]

As Judge Bittner notes in her Opinion and Recommended Ruling, the governing statute is discretionary. See Mary Thomson, M.D. 65 FR 75,969 (2000). In exercising discretion in determining the appropriate remedy in any given case, the Deputy Administrator considers all the facts and circumstances of the case. See Martha Hernandez, M.D., *supra,* 62 FR 61,145.

In recommending revocation of Respondent's registrations, Judge Bittner concluded,

> False statements on an application for DEA registration withhold from DEA information that is germane to the applicant's fitness to hold that registration. Kuen H. Chen, M.D., 58 FR 65401 (DEA 1993). Further, as discussed above, Respondent insisted that his answers to the questions on his 1998 and 2001 applications for renewal of his DEA registrations were accurate.
>
> They were not. In addition and also discussed above, Respondent's explanations of his answers on these applications were at best disingenuous. Respondent's cavalier attitude toward his responsibility to truthfully answer questions on the application raises serious concerns about whether he is willing to accept the other responsibilities inherent in a DEA registration.

The Deputy Administrator has examined the record and finds the facts and credibility determinations of Judge Bittner to be well supported by the evidence. While the record does not establish that Respondent's continued registration would be inconsistent with the public interest, he materially falsified four applications for renewal of registration, which constitutes an independent ground for revocation.

The Deputy Administrator shares Judge Bittner's concern regarding Respondent's on-going refusal or inability to acknowledge a registrant's responsibility to provide forthright and complete information to DEA, when required to do so as a matter of law or regulation. This attitude, reflected most recently in his testimony at the hearing under oath, does not auger well for his future compliance with the responsibilities of a registrant.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), and 0.104, hereby orders the DEA Certificates of Registration BP3420344 and BP4416029, issued to Felix K. Prakasam, M.D., be, and hereby are, revoked. The Deputy Administrator further orders that any pending applications to renew or modify said registrations be denied. This order is effective July 7, 2005.

Dated: May 25, 2005.

Michele M. Leonhart,

Deputy Administrator.

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[2] Respondent signed the Consent Order with the Louisiana Board on February 2, 2001, however it was not effective until March 20, 2001. Judge Bittner noted that the 2001 DEA applications, which Respondent signed on February 27 and 28, 2001, did not specifically ask whether any disciplinary proceedings were then ''pending.'' Accordingly, she concluded that, ''at least arguably, Respondent was not required to disclose the Louisiana action inasmuch as it was not effective until March 20, 2001.'' While, given the wording of the application's questions, Respondent's omissions in failing to report this action may not have amounted to material misrepresentations under 21 USC 824(a)(1), it demonstrates his willingness to draw exceptionally fine lines in dealing with DEA regulators.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 05–9]

Roger A. Rodriguez, M.D., Denial of Registration

On October 8, 2004, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Roger A. Rodriguez, M.D. (Respondent) of Peoria, Illinois, notifying him of an opportunity to show cause as to why DEA should not deny his application for a DEA Certificate of Registration as a practitioner pursuant to 21 U.S.C. 823(f).

As a basis for denial, the Order to Show Cause alleged, in substance, that Respondent: (1) Issued prescriptions and dispensed controlled substances to undercover law enforcement personnel on multiple occasions without an adequate physical examination or bona fide medical reason; (2) failed to maintain required controlled substance records; and (3) surrendered a prior DEA registration on June 19, 2003, and then used another practitioner's DEA registration number to issue a prescription for controlled substances.

Respondent, through counsel, timely requested a hearing in this matter. On November 22, 2004, the Presiding Administrative Law Judge Mary Ellen Bittner (Judge Bittner) issued the Government, as well as Respondent, an Order for Prehearing Statements.

In lieu of filing a prehearing statement, the Government filed a Motion for Summary Disposition. In its motion the Government asserted that as of December 20, 2004, Respondent was no longer authorized to handle controlled substances in Illinois, his state of applied-for registration. As a result, further proceedings in this matter were not required. Attached to the Government's motion was a copy of the Illinois Department of Financial and Professional Regulation, Division of Professional Regulation (Illinois Board) Order dated December 20, 2004. That Order temporarily suspended Respondent's Illinois medical license and state Controlled Substances Registration, pending further proceedings before the Illinois Board.

On January 4, 2005, Judge Bittner issued a Memorandum to Counsel providing Respondent until January 18, 2005, to respond to the Government's motion. Respondent then filed a motion on January 14, 2005, seeking an extension of time to file his response to the Government's motion. In it, he claimed there was a hearing scheduled before the Illinois Board on January 18, 2005, which could impact the suspension order. Over the Government's objections, Judge Bittner granted Respondent an extension until February 8, 2005, to file his response.

On February 8, 2005, Respondent filed his Response to the Motion for Summary Disposition. In that response he did not contest that his medical and controlled substance licenses were then-suspended, but asserted he was in negotiations with the Illinois Board that might result in an agreed-to four-month suspension of his medical license. Respondent asked Judge Bittner to stay action on the Government's motion until the state disciplinary proceeding was resolved.

On February 16, 2005, Judge Bittner issued her Opinion and Recommended Decision of the Administrative Law Judge (Opinion and Recommended Decision). As part of her recommended ruling, Judge Bittner denied Respondent's request to stay the proceedings and granted the Government's Motion for Summary Disposition, finding Respondent lacked authorization to handle controlled substances in Illinois, the jurisdiction