(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. 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 he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. See Henry J. Schwarz, Jr., M.D., Docket No. 88–42, 54 FR 16,422 (1989).

Regarding factor one, the record indicates that while Respondent surrendered his state controlled substances license in December 1992, it ha since been reinstated with no restrictions. In addition, it is unclear exactly what action, if any, was taken by the Texas State Board of Medical Examiners regarding Respondent's license to practice medicine in that state. However, it is undisputed that he is currently licensed to practice medicine in Texas.

As to Respondent's experience in dispensing controlled substances, it is clear that Respondent prescribed controlled substances to the undercover agents for no legitimate medical reason. The agents told Respondent that they were cocaine users and that they needed Tylenol with codeine and Valium to help them come off their cocaine highs. The Acting Deputy Administrator finds that prescribing controlled substances for this purpose is reprehensible, since it fosters the continued illegal use of cocaine.

Regarding factor three, Respondent has been convicted of a controlled substance related offense. DEA has consistently held that a deferred adjudication of guilt following a plea of guilty is a conviction within the meaning of the Controlled Substances Act. See Harlan J. Borcherding, D.O., 60 FR 28,796 (1995); see also Clinton D. Nutt, D.O., 55 FR 30,992 (1990) (where plea was ''nolo contendere'' rather than ''guilty''). In his letter dated June 16, 1996, Respondent's counsel eludes to an entrapment defense to the charges brought against Respondent. There is no elaboration of this argument in Respondent's letter, and it is nonetheless irrelevant to this proceeding, since Respondent pled guilty to the charges against him.

As to factor four, Respondent's conviction in state court for the unlawful prescribing clearly shows that Respondent failed to comply with the applicable state law. In addition, Respondent's prescribing of controlled substances to the undercover agents for no legitimate medical purpose was in violation of 21 U.S.C. 841(a)(1).

In June 16, 1996 letter, Respondent's counsel asserts that Respondent has ''never had any trouble with the D.E.A. prior to 1993 and he does need his D.E.A. Certificate so that he may practice normally again.'' However, other than counsel's unsubstantiated assertions, there is no documentation in the record of Respondent's fitness to handle controlled substances.

The Acting Deputy Administrator concludes that based upon the record before him, Respondent's registration with DEA would be inconsistent with the public interest. Respondent prescribed highly abused substances for no legitimate medical purpose to purported users of cocaine. There is no indication that Respondent can now be trusted to responsibly handle controlled substances.

Accordingly, the Acting Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823, and 28 C.F.R. 0.100(b) and 0.104, hereby orders that the application submitted by Yu-To Hsu, M.D. for a DEA Certificate of Registration be, and it hereby is, denied. This order is effective April 17, 1997.

Dated: March 10, 1997.

[FR Doc. 97–6793 Filed 3–17–97; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 95–36]

Donald P. Tecca, M.D. Continuation of Registration With Restrictions

On April 3, 1995, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Donald P. Tecca, M.D. (Respondent) of San Diego, California, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration, AT1241847, and deny any pending applications for renewal of such registration as a practitioner under 21 U.S.C. 823(f), for reason that pursuant to 21 U.S.C. 824(a)(4), his continued registration would be inconsistent with the public interest. The Order to Show Cause alleged, in essence, that: (1) in June 1992, DEA received complaints from several area pharmacies that Respondent was overprescribing controlled substances including Vicodin and codeine, and in particular, one individual has received 1,640 dosage units of Tylenol No. 3 with codeine over a three month period; and (2) on eight occasions between December 28, 1992 and May 25, 1993, Respondent prescribed controlled substances to undercover officers for no legitimate medical reason.

By letter dated April 26, 1995, Respondent, through counsel, filed a timely request for a hearing, and following prehearing procedures, a hearing was held in San Diego, California on September 19 and 20, 1995, before Administrative Law Judge Mary Ellen Bittner. At the hearing, both parties called witnesses and introduced documentary evidence. After the hearing, counsel for both parties submitted proposed findings of fact, conclusions of law and argument. On June 21, 1996, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusion of Law and Decision, recommending that Respondent's DEA registration be revoked, and any pending applications for registration be denied. Respondent filed exceptions to Judge Bittner's Opinion and Recommended Ruling, and thereafter, on August 6, 1996, the record of these proceedings was transmitted to the Deputy Administrator.

The Acting Deputy Administrator has considered the record in its entirety, and pursuant to 21 C.F.R. 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Acting Deputy Administrator adopts, except as noted, the findings of fact and conclusions of law of the Administrative Law Judge, but rejects the recommended ruling, for the reasons stated below.

The Acting Deputy Administrator finds that Respondent graduated from medical school in 1980, and in 1983, become board certified in internal medicine. At the time of the hearing in this matter, he was on the senior staff at three hospitals in San Diego, had consulting privileges at a psychiatric hospital in San Diego, was the chief of the Department of Medicine at one of the local hospitals, and maintained a private practice in internal medicine.

In 1992, two local pharmacists made allegations to DEA that Respondent may have been overprescribing controlled substances. While the Order to Show Cause issued in this proceeding cited this alleged overprescribing as evidence

that Respondent's continued registration would be inconsistent with the public interest, no evidence was introduced at the hearing regarding the validity of these allegations. Therefore, the Acting Deputy Administrator has only considered the pharmacists' allegations as the basis for the initiation of the investigation. Subsequently, state undercover officers made 10 visits to Respondent's office between December 1992 and July 1993 to attempt to obtain controlled substance prescriptions from Respondent for no legitimate medical purpose.

The first visit occurred on December 28, 1992, when Special Agent Roberts of the Bureau of Narcotic Enforcement (BNE) of the California Department of Justice attempted to obtain a prescription for anabolic steroids from Respondent. Before seeing Respondent, Agent Roberts filled out a patient history form on which he did not indicate any medical problems, and a nurse weighed him and took his blood pressure and pulse. The transcript of this visit indicates that Respondent asked Agent Roberts a series of medical history questions. Agent Roberts then told Respondent that he was not seeing results at the gym, that he was going to jail for a year and that he wanted to ''gain some size''. Respondent indicated that it would probably not hurt Agent Roberts to take anabolic steroids to put on muscle mass since he appeared healthy. Then, in the agent's presence, Respondent telephoned a local pharmacist seeking advice as to what to prescribe for this purpose. Respondent testified that the pharmacist told him that Anadrol was used for that purpose, but did not indicate that such use of the substance was illegal or that it was a controlled substance. Following the conversation with the pharmacist, Respondent told the agent, ''Anadrol is what they use but it's not supposed to be prescribed for this purpose.'' Respondent then consulted the 1991 edition of the Physicians' Desk Reference, which did not indicate that Anadrol was a controlled substance, to determine the proper dosage to prescribe. Respondent told Agent Roberts that, ''I don't think there's anything illegal about this, it's just frowned on because it's felt that the risk outweighs the gain.'' Respondent warned Agent Roberts of the possible side effects, advised him to discontinue taking the medication if any of the side effects occurred, and told him to return in three weeks for a blood test. Respondent then issued Agent Roberts a prescription for 120 dosage units of Anadrol with no refills, impressing upon him the need for follow-up care. Agent Roberts paid $40.00 for the office visit.

At the follow-up visit on January 19, 1993, Agent Roberts had gained a pound, his blood pressure had gone down, and he reported some strength gains. The transcript of this visit indicates that Respondent asked about various side effects, and Agent Roberts indicated that he had not experienced any side effects. Respondent examined Agent Roberts for possible liver enlargement and Respondent's nurse drew blood. Agent Roberts asked Respondent for a prescription for Cylert, a Schedule IV stimulant, because he felt that he was ''kind of dragging''. Agent Roberts testified at the hearing that he asked for Cylert because it is commonly taken by steroid users and because it was his understanding that physicians who unlawfully prescribe controlled substances will issue prescriptions for all types of controlled substances. Respondent refused to give Agent Roberts a prescription for Cylert and suggested aerobic activity instead. Respondent wrote Agent Roberts a prescription for 100 dosage units of Anadrol with three refills, told him to return in two months for a follow-up visit, and told him to call the office for the results of the blood test. Agent Roberts paid $45.00 for the office visit.

Sergeant Arvizu, then with the Medi-Cal Fraud Unit of the Department of Health Services, went to Respondent's office on two occasions, posing as Agent Roberts' girlfriend. Sergeant Arvizu had never acted in an undercover capacity before and was instructed to ask for Tylenol No. 3 with codeine (Tylenol No. 3), a Schedule III controlled substance, without telling Respondent that anything was wrong with her. There were no transcripts of these visits introduced into evidence at the hearing.

On February 8, 1993, she entered Respondent's office, told the receptionist that she was there for a check-up, filled out medical history forms indicating as her chief complaint ''check-up'', and had her weight, temperature and blood pressure taken. Sergeant Arvizu testified that when Respondent asked her why she was there, she told him that she was there for a check-up and that she wanted some Tylenol No. 3. She testified that Respondent said ''sure'' and then asked some medical history questions and checked her chest and back with a stethoscope, checked her eyes, ears, throat, and neck, and reported that she was in good health. Respondent testified that Sergeant Arvizu stated that she wanted the Tylenol No. 3 to feel good and that implicit in that request was that something was wrong with her. He testified that he performed an extensive physical examination of Sergeant Arvizu and found her to be very tense with quite a bit of muscle tenderness and rigidity. At first, Respondent testified that Sergeant Arvizu winced during the physical examination and told him that she had muscle pain, but later testified that the finding of pain was based solely upon his physical examination and her social history. Respondent's medical chart for Sergeant Arvizu indicated ''Normal exam with muscle tenderness-tension * * * Tylenol #3 for tension-muscle pain.'' Sergeant Arvizu however testified that she never told Respondent that anything was wrong with her and that there was no discussion during this visit of any muscle pain or tenderness. Judge Bittner found Sergeant Arvizu to be a credible witness and that she did not tell Respondent that she was in pain. Respondent issued Sergeant Arvizu a prescription for 40 tablets of Tylenol No. 3, ''per pain'', with no refills.

Sergeant Arvizu returned to Respondent's office on February 22, 1993, and had her weight and blood pressure taken. She testified that she told Respondent that she wanted another prescription for Tylenol No. 3 because it made her feel good. Sergeant Arvizu further testified that Respondent stated that ''this isn't really legitimate * * * it's not really legal * * * you're putting me in a bind.'' Sergeant Arvizu testified that there was then some discussion where Respondent said that something had to be wrong with her and ''he made a suggestion about a headache or a backache.'' Sergeant Arvizu also testified that she told Respondent that she had used drugs in the past, but that Respondent stated that he did not think that she was addicted to the Tylenol No. 3, however she should only use it for emergencies. Respondent testified that he conducted a brief physical examination on this occasion. His notes of the visit indicate ''some muscle tenderness'' in the neck and ''Tylenol #3 for tension Headaches—may be useful to keep her off drugs and monitor usage.'' Respondent further testified that there was no indication of any misuse of the previous prescription for Tylenol No. 3. Respondent issued Sergeant Arvizu a prescription for 48 tablets of Tylenol No. 3 with no refills, ''per pain'' and she paid the receptionist $20.00 for the visit.

Next, BNE Agent Ellis went to Respondent's office on two occasions posing as a friend of Agent Roberts and seeking Winstrol, an anabolic steroid. On his first visit on March 22, 1993, Agent Ellis filled out a patient history

form indicating no medical problems, and then a nurse took his weight and blood pressure, which was a little high. Agent Ellis then met with Respondent and told Respondent that he was referred by his friend who had gotten steroids from Respondent and that he wanted some Winstrol to help him gain strength at the gym. Respondent indicated that he knew who Agent Ellis was referring to, since he had only prescribed steroids once before. Respondent then asked some medial history questions, took Agent Ellis' blood pressure again, and stated that Winstrol is ''not totally benign'' describing the various possible side effects. Respondent told Agent Ellis that he needed to have a blood test for a baseline, but Agent Ellis was reluctant to have blood drawn. Respondent insisted that he could not give Agent Ellis the Winstrol without a blood test, since the whole point of going to a doctor is so the doctor can monitor the patient. Respondent issued Agent Ellis a prescription for 60 dosage units of Winstrol and told him to come back for a follow-up visit in a month. The transcript of this visit indicates that Agent Ellis said, ''You know if I had a good supply of these we could make lots of money,'' and Respondent replied, ''Well, I'm not interested in that. Basically, you know, I'm not interested in making money; I'm just interested that if I do a treatment, it's used properly.'' Agent Ellis paid $65.00 for the visit.

Agent Ellis returned for his follow-up visit on April 26, 1993, during which a nurse took his weight and blood pressure. Respondent discussed the results of the blood test with Agent Ellis, asked if he had experienced any side effects, to which Agent Ellis reported none, checked Agent Ellis' liver, and gave Agent Ellis information about a low-cholesterol diet. Respondent then indicated that he would give Agent Ellis a refill of the prescription, but that next month he was going to reduce the dosage. Agent Ellis then asked if he could pick up a prescription for his friend, Agent Roberts. Respondent refused to issue such a prescription and essentially told Agent Ellis that he would not issue a prescription without seeing the patient. Respondent gave Agent Ellis a prescription for 60 tablets of Winstrol and with no refills, and Agent Ellis paid $39.00 for the office visit.

On May 3, 1993, Investigator Hutchison of the Medical Board of California went to Respondent's office in an undercover capacity seeking Vicodin, a Schedule III controlled substance. Investigator Hutchison completed a patient history form on which she did not indicate any medical complaints. A nurse took her weight and blood pressure. Respondent asked Investigator Hutchison a series of medical history questions and the investigator then asked for some Vicodin explaining that she liked to take it when she went out with her friends because she did not like alcohol. She told Respondent that Vicodin made her feel relaxed and mellow. The transcript of this visit indicates that Respondent stated on more than one occasion that this was a strange request and that he had never had a request like this before. Respondent warned Investigator Hutchison of the risks of addiction and that such use could lead to abuse of other substances. Investigatory Hutchison said that she used the Vicodin infrequently. Respondent told Investigator Hutchison that if he gave her a small prescription she would not become addicted, but that she should really reconsider using the drug to relax since such use was not accepted in society. Respondent also acknowledged that it was illegal for him to give her the drug to feel good. Investigator Hutchison offered to tell Respondent that she had a headache. Respondent issued Investigator Hutchison a prescription for 30 tablets of Vicodin and charged her $40.00 for the visit. Respondent testified that he knew that Investigator Hutchison did not have a headache and that she was using the Vicodin inappropriately, but that he issued her a trial prescription to see how she would use the drug and then would try to treat her inappropriate use the drug.

Investigator Hutchison returned to Respondent's office on June 28, 1993, and asked for another prescription for Vicodin. The transcript of this visit indicates that Respondent repeatedly told Investigator Hutchison that what she was doing was wrong. Respondent discussed the dangers of addiction and that it was illegal for her to use the Vicodin for her stated purpose.

Respondent attempted to discourage Investigator Hutchison from continuing to use Vicodin the way she had been using it. Investigator Hutchison offered several times to tell Respondent that she had headaches or pain. Respondent refused to issue Investigator Hutchison a prescription and did not charge her for this visit. Investigator Hutchison testified that she believed that Respondent was trying to establish a rapport with her and counseled her on the misuse of Vicodin for illegal purposes.

Finally, BNE Agent Price made two undercover visits to Respondent attempting to obtain prescriptions for Tylenol No. 3 without indicating a medical reason for the substance. On May 25, 1993, Agent Price filled out a patient history form indicating no medical problems. Agent Price told Respondent that she had received Tylenol No. 3 about a year and a half earlier following an appendectomy, and that she usually kept some on hand. Agent Price told Respondent that she had no real pain, but used the Tylenol No. 3 for relaxation. The transcript indicates that Agent Price told Respondent that ''I work out at the gym a lot like that. When I get home I just, once in awhile I might take a pill or something.'' Agent Price further stated that it was ''not so much for aches * * * it just kind of relaxes me.'' Respondent performed a brief physical examination. Respondent told Agent Price that her request was strange and he was not sure that he approved of her using Tylenol No. 3 for relaxation since it was a pain pill, but decided that he could give her a few pills for emergencies. Respondent issued Agent Price a prescription for 30 tablets for Tylenol No. 3 with one refill and she paid $40.00 for the office visit. Respondent testified at the hearing that he was confused by Agent Price's request because she did not appear to be an addict since she was well-groomed and stated that she only used a few pills, and he had never before had anyone request Tylenol No. 3 for relaxation. Respondent further testified that he interpreted Agent Price's use of the word ''relaxation'' to mean relief from pain.

Agent Price returned to Respondent's office on July 26, 1993 and told Respondent that she was not having any pains, that she wanted the drug only for relaxation, and that she was just coming back for a refill of the Tylenol No. 3 prescription. Respondent reiterated that Tylenol No. 3 is used for pain and not relaxation, and that he did not believe that Agent Price was using the medication for relief of pain. Respondent expressed concern that Agent Price was becoming dependent on the drug and refused to issue her another prescription. Respondent did not charge Agent Price for the visit. On her chart for this visit, Respondent wrote as his assessment, ''Drug Addiction (highly likely).''

A Special Agent with BNE testified at the hearing that he had asked various knowledgeable sources, including manufacturers of anabolic steroids, the Food and Drug Administration, and the American Medical Association, whether the use of anabolic steroids to build muscle mass is appropriate, and that all

of them replied in the negative. Anabolic steroids became controlled substances under California law effective August 20, 1986, and effective February 27, 1991, anabolic steroids became a Schedule III controlled substance federally under the Controlled Substances Act. Respondent testified that before prescribing Anadrol and Winstrol to the undercover officers he consulted the 1991 edition of the Physicians' Desk Reference, which did not indicate that they were controlled substances.

The Director of Pharmacy Services at the psychiatric hospital where Respondent had consulting privileges, testified that he monitors and fills the prescriptions of doctors at the hospital and that he has known Respondent for 10 years. He further testified that he had never seen a prescription issued by Respondent for anabolic steroids and that in his opinion, Respondent's use of Tylenol No. 3 and Vicodin is very conservative and clinically appropriate. Three physicians, Respondent's supervisor, an associate professor at the University of California San Diego School of Medicine, and an internist in private practice, all testified at the hearing that his prescribing of Vicodin and Tylenol No. 3 to the undercover agents was medically appropriate, and that in 1992 and 1993, they were unaware that anabolic steroids were controlled substances. One of the doctors testified that it is a common practice to issue a trial prescription if a doctor is not sure whether a substance is being misused. Respondent's supervisor at one of the hospitals rated Respondent's medical abilities as a ten on a scale of ten. Respondent also introduced into evidence a letter from a doctor who has known Respondent for 11 years and considers him ''a most knowledgeable, conscientious and ethical physician.'' This doctor also stated in his letter that Respondent ''practiced at the standard of the community'' in his prescribing of controlled substances to the undercover officers. Respondent also introduced into evidence a letter from a physician who has known Respondent for 11 years and shared an office with him for four years, who stated that Respondent ''has consistently demonstrated high quality medical care.'' Finally, Respondent introduced a letter from a pharmacist who has known Respondent for approximately 12 years and has filled hundreds of his prescriptions. The pharmacist considers Respondent to be a ''very conscientious, dedicated, and knowledgeable physician.''

Respondent testified at the hearing that he felt that he was already conservative in his prescribing practices, but that as a result of this experience he has become even more conservative. He stated that he would never prescribe anabolic steroids again and that he has learned that he must be very cautious in his prescribing of Schedule III controlled substances.

Pursuant to 21 U.S.C. 823(f) and 824(a)(4), the Deputy Administrator may revoke a DEA Certificate of Registration and deny any pending applications, if he determines that the continued registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered.

(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. 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 he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. See Henry J. Schwarz, Jr., M.D., Docket No. 88–42, 54 FR 16,422 (1989).

Regarding factor one, there is no evidence in the record of any state action taken against Respondent's license to practice medicine. Likewise, regarding factor three, there is no evidence that Respondent has even been convicted under federal or state laws relating to the manufacture, distribution, or dispensing of controlled substances.

As to factor, four, Respondent's experience in dispensing controlled substances, the Administrative Law Judge found that Respondent issued prescriptions to Sergeant Arvizu, Investigator Hutchison and Agent Price for no legitimate purpose. Judge Bittner found that ''Respondent prescribed Vicodin to Investigator Hutchison despite knowing any saying that doing so was illegal because she had not complained of any headache or other pain.'' Respondent testified that he diagnosed Investigator Hutchison as inappropriately using Vicodin; that he could have turned her away, but felt that his job was not to just diagnose, but to treat the problem; and that he therefore issued her a trial prescription on her first visit. Judge Bittner specifically found that ''[a]' 'trial prescription' of a controlled substance just to see how a patient will use the substance * * * is too likely to result in diversion and is not given for a legitimate medical purpose. The same is true of prescribing a controlled substance just to build a relationship with a patient.'' The Acting Deputy Administrator agrees that a DEA registrant must be extremely careful in the dispensing of controlled substances to protect against the diversion of these dangerous substances. However, the Acting Deputy Administrator does not adopt Judge Bittner's general proposition that trial prescriptions are not issued for a legitimate medical purpose. The Acting Deputy Administrator believes that every prescription must be evaluated in light of the totality of the circumstances surrounding the issuance of a prescription, and one of the physicians who testified in this proceeding indicated that it is common practice to issue trial prescriptions to see if a drug is being misused. But, the Acting Deputy Administrator does find that in this case, Respondent's prescribing of Vicodin to Investigator Hutchison during her first visit was extremely questionable and was evidence of Respondent's lax prescribing practices. Respondent admitted that he knew that Investigator Hutchison was misusing Vicodin. Therefore, there was presumably no need to issue a trial prescription.

Regarding Sergeant Arvizu, the Acting Deputy Administrator concurs with Judge Bittner's conclusion that ''Respondent prescribe Tylenol No. 3 to Sergeant Arvizu although she said she was not in pain,'' and that this prescribing was ''especially inappropriate'' since she had indicated that she had a drug abuse problem in the past, and that should have caused Respondent to be ''particularly suspicious of her specific request for Tylenol No. 3.'' Respondent himself admitted at the hearing that his experience with Sergeant Arvizu taught him that he needs ''to be very cautious in prescribing Schedule III medications.''

The Acting Deputy Administrator concludes that Respondent's issuance of a prescription to Agent Price was highly questionable given that she told him that she used Tylenol No. 3 for relaxation and not for pain. Respondent thought this was a strange request, but nonetheless issued her a prescription for the drug to keep on hand for

emergencies. The Acting Deputy Administrator finds that this prescribing is evidence of Respondent's lax practices.

Regarding Respondent's prescribing of anabolic steroids to the two undercover agents, the Acting Deputy Administrator agrees with Judge Bittner that there is no evidence in the record that Respondent knew that these were controlled substances. In addition, the record shows that Respondent advise the agents of the potential side effects from taking the steroids; required that the agents submit to blood tests for monitoring purposes; told the agents to return for follow-up visits; checked for side effects during the follow-up visits; consulted with a pharmacist regarding what substance to prescribe; and consulted the Physicians' Desk Reference regarding the proper dosage to prescribe. As will be discussed in the context of factor four, the prescribing of steroids for the purpose of building muscle mass is not a legitimate medical use, however it appears from the record that Respondent was attempting to dispense the substances in a responsible fashion.

The Acting Deputy Administrator also finds it significant, that Respondent refused one of the agent's invitations to go into the business of selling anabolic steroids, stating that he was not interested in making money, but in the proper management of the medication; that Respondent refused to issue Agent Roberts a prescription for Cylert; and that Respondent refused to give Agent Ellis a prescription for his friend who was not present, stating that he had to see the friend personally before he would issue a prescription.

Judge Bittner concluded that, ''[a]though there is no direct evidence that Respondent has done anything improper outside of the ten undercover visits that took place as part of this investigation, what occurred in those visits establishes that Respondent is lax about prescribing controlled substances and that he is likely to prescribe controlled substances for other than legitimate medical purposes in other situations.''

The Acting Deputy Administrator concurs with Judge Bittner that there is evidence in the record that, at least on some occasions, Respondent was lax in this controlled substance prescribing practices. However, there is also evidence in the record that other physicians and pharmacists, who are in positions that enable them to observe and evaluate Respondent's prescribing practices, find him to be conscientious, knowledgeable, and ethical. In addition, Respondent testified that this experience has caused him to ''become more conservative''. Therefore, unlike Judge Bittner, the Acting Deputy Administrator concludes that with proper training and monitoring, as will be discussed below, it is unlikely that Respondent will prescribe controlled substances for other than legitimate medical purposes in the future.

Regarding factor four, there is evidence in the record that Respondent prescribe control substances for no legitimate medical purpose and therefore violated 21 U.S.C. § 841(a), 21 C.F.R § 1306.04(a) and California Health and Safety Code § 11153(a). Respondent prescribed narcotic pain medication to three of the undercover agents after they specifically told him that they were not in pain. Investigator Hutchison was prescribed Vicodin after telling Respondent that she used it to ''mellow out''. Sergeant Arvizu was prescribed Tylenol No. 3 after telling Respondent that she takes it ''to feel good.'' Finally, Respondent prescribed Tylenol No. 3 to Agent Price after she told him that she used it ''for relaxation and to unwind''. DEA has previously revoked registrations based upon similar conduct. See *Mukand Lal Arora, M.D.*, 60 FR 4447 (1995) (practitioner's DEA registration was revoked upon a finding that the practitioner prescribed Vicodin to an undercover officer to mellow-out where the undercover officer did not give an indication of any medical purpose and denied any physical complaint.)

In addition, on four occasions, Respondent prescribed anabolic steroids to undercover agents for no legitimate medical purpose. A BNE Agent testified at the hearing before Judge Bittner that according to various knowledgeable sources, including manufacturers of anabolic steroids, the Food and Drug Administration, and the American Medical Association, it is not proper medical practice to use anabolic steroids to build muscle mass. DEA has previously held that the prescribing of anabolic steroids for body enhancement is a violation of California law, since it was not prescribed for a legitimate medical purpose. See *John W. Copeland, M.D.*, 59 FR 47,063 (1994).

The Administrative Law Judge concluded ''that the record as a whole establishes that Respondent's continued registration would be inconsistent with the public interest.'' Judge Bittner further concluded that ''[u]ntil Respondent can demonstrate that he acknowledges that his decisions were wrong and understands why and has taken concrete steps to prevent it from happening again, allowing him to dispense controlled substances presents to great a risk that controlled substances will be diverted into illicit channels.'' Therefore, Judge Bittner recommended that Respondent's DEA registration be revoked.

Respondent argues in his exceptions to Judge Bittner's Recommended Ruling that the Government did not meet its burden of proof; that a preponderance of the evidence shows that Respondent's continued registration is consistent with the public interest; that Judge Bittner's interpretation of the evidence was ''one-sided'' and ''unfair''; that a re-examination of the evidence refutes that Respondent was lax in his prescribing practices or would be so in the future; and that Respondent has accepted full responsibility for his actions. In his exceptions, Respondent provided detailed citations to the record in support of his arguments, and provided evidence of what he has done since the hearing ''to avoid any similar incidents in the future''. In addition, Respondent suggested an alternative resolution to complete revocation, whereby certain restrictions would be placed on his DEA registration.

The Acting Deputy Administrator has not considered the new information in the exceptions submitted by Respondent that was not part of the record derived from the hearing. Exceptions are a vehicle for pointing out perceived errors in the recommended decision of the Administrative Law Judge and not a vehicle for introducing evidence not admitted through testimony and/or exhibits at the hearing. Respondent could have filed a motion to reopen the record had he wanted this new information considered.

However, the Acting Deputy Administrator has carefully considered the entire record in this proceeding, including Respondent's exceptions to Judge Bittner's recommended decision, and concludes that while the Government established a prima facie case based upon Respondent's lax prescribing of controlled substances to the undercover officers, complete revocation of Respondent's registration is not necessary at this time to protect the public interest. Evidence of Respondent's lax prescribing practices appears to be limited to the prescriptions provided to the undercover officers. Respondent testified at the hearing that in hindsight he should not have prescribed some of the substances to the undercover officers, and that he has become more conservative in his prescribing practices. Therefore, the Acting Deputy Administrator finds that Respondent's actions do not warrant complete revocation of his DEA registration.

Nonetheless, a DEA registration carries with it the responsibility to ensure that controlled substances are only prescribed for a legitimate medical purpose thereby preventing the diversion of these potentially dangerous substances from legitimate channels. Therefore, the Acting Deputy Administrator concludes that some monitoring of Respondent's controlled substance handling practices and some training in the proper handling of controlled substance is necessary to protect the public health and safety.

Thus, the Acting Deputy Administrator concludes that Respondent's DEA registration should be continued subject to the following conditions:

(1) For a period of two years from the effective date of this order, Respondent shall be required to submit to the DEA San Diego Field Division for review every three months, a log of his prescribing, dispensing and administering of controlled substances. This log shall include, at a minimum, the date of the prescribing, dispensing and administering, the name of the patient, and the name, dosage and quantity of the controlled substance prescribed, administered or dispensed.

(2) Within three months of the effective date of this order, Respondent shall provide to the DEA San Diego Field Division evidence of the successful completion of at least 24 hours of training in the proper handling of controlled substances.

Accordingly, the Acting Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 C.F.R. 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AT1241847, issued to Donald P. Tecca, M.D., be continued, and any pending applications be granted, subject to the above conditions. This order is effective April 17, 1997.

James S. Milford,

Acting Deputy Administrator.

Dated: March 4, 1997.

[FR Doc. 97–6795 Filed 3–17–97; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 96–31]

Anne Lazar Thorn, M.D. Revocation of Registration

On April 15, 1996, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Anne Lazar Thorn, M.D. (Respondent), of Lafayette, Louisiana, notifying her of an opportunity to show cause as to why DEA should not revoke her DEA Certificate of Registration, AT6512152, pursuant to 21 U.S.C. 824(a)(3), and deny any pending applications for renewal of such registration as a practitioner pursuant to 21 U.S.C. 823(f), for reason that effective October 18, 1993, the Louisiana State Board of Medical Examiners indefinitely suspended her license to practice medicine and as a result, she is not currently authorized to handle controlled substances in the State of Louisiana.

By letter dated April 29, 1996, Respondent, acting pro se, filed a timely request for a hearing, and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. On May 3, 1996, Judge Bittner issued an Order for Prehearing Statements. On May 24, 1996, in lieu of filing such a statement, the Government filed a Motion for Summary Disposition and to Stay Proceedings, asserting that ''Respondent is without state authorization to handle controlled substances at this time.'' Attached to the motion was a copy of the Louisiana State Board of Medical Examiner's (Board) decision dated October 18, 1993, indefinitely suspending Respondent's license to practice medicine and a copy of a letter from the Board notifying DEA that Respondent's license to practice medicine in the State of Louisiana was suspended.

On June 3, 1996, the Administrative Law Judge received a letter from an attorney indicating that he had been retained to represent Respondent, and on June 21, 1996, counsel for Respondent filed a Memorandum in Opposition to Government's Motion for Summary Disposition and Motion to Stay Proceedings. Respondent did not deny that she is currently without authority to handle controlled substances in the State of Louisiana. However, she argued that 21 U.S.C. 824(a) provides for the Deputy Administrator to use his discretion in determining whether to revoke or suspend a registration because of lack of state authority to handle controlled substances and that a hearing is necessary to determine what action should be taken against Respondent's registration. Respondent further argues that this matter is not yet ripe for determination since Respondent has not ''had the opportunity to present her evidence with supporting testimony concerning her current fitness to practice medicine, or the steps which she is taking to seek the reinstatement of her license to practice medicine in the State of Louisiana.''

On July 25, 1996, Judge Bittner issued her Opinion and Recommended Decision, finding that Respondent is not currently authorized to handle controlled substances in the State of Louisiana; that she is bound by DEA's interpretation of the Controlled Substances Act that, pursuant to 21 U.S.C. 823(f) and 802(21), a petitioner may not hold a DEA registration without state authority to handle controlled substances; that since no material question of fact is involved, a hearing is not necessary; and that while the statue provides for the revocation *or* suspension, revocation is appropriate in this case since there is no indication that Respondent's state license will be reinstated any time soon. Accordingly, Judge Bittner granted the Government's Motion for Summary Disposition and recommended that the Respondent's DEA Certificate of Registration be revoked.

On August 8, 1996, Respondent filed with the Administrative Law Judge a Motion for Reconsideration and/or to Alter or Amend Judgment (Motion for Reconsideration). Respondent argued that the Board suspended her license indefinitely, rather than revoking it entirely, and that it would remain suspended until further order of the Board. Respondent asserted that the only evidence before the Administrative Law Judge in rendering her recommended decision was the order of the Board dated October 18, 1993 and that ''a great deal has transpired with respect to Respondent's license to practice medicine and the steps she has taken to have her license reinstated.'' Respondent argued that she should be given an opportunity for a hearing regarding her DEA registration in order to outline the steps she has taken to have her state license reinstated, and that the evidence which would have been presented at a hearing would have aided the Administrative Law Judge in deciding whether to recommend revocation or suspension of Respondent's registration. Respondent contended that ''the decision to permanently revoke a physician's registration to distribute drugs is a serious sanction, and is one which should not be rendered without considering all of the evidence in a particular case.''

Therefore, Respondent requested that the Administrative Law Judge reconsider her decision to deny Respondent the opportunity for a hearing, or in the alternative, that the Administrative Law Judge alter her recommendation from revocation to