Fifteenth Amendments of the Constitution of the United States in Jefferson County, Texas. This county is included within the scope of the determinations of the Attorney General and the Director of the Census made on September 18, 1975, under Section 4(b) of the Voting Rights Act of 1965 and published in the Federal Register on September 23, 1975 (40 FR 43746).

Dated: December 5, 1996.

Janet Reno,

Attorney General of the United States.

[FR Doc. 96–31403 Filed 12–9–96; 8:45 am]

BILLING CODE 4410–01–M

Drug Enforcement Administration

[Docket No. 96–20]

Jonathan Agbebiyi, M.D.; Revocation of Registration

On September 5, 1995, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Jonathan A. Agbebiyi, M.D. (Respondent) of Phoenix, Arizona, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration, AA2034306, under 21 U.S.C. 824(a)(3), and deny any pending applications for renewal of such registration as a practitioner under 21 U.S.C. 823(f). Specifically, the Order to Show Cause alleged that on or about January 26, 1994, the Arizona Board of Medical Examiners revoked the Respondent's state medical license, and consequently, the Respondent was no longer authorized to handle controlled substances in the State of Arizona.

By letter dated February 24, 1996, the Respondent filed a timely request for a hearing, and the matter was docketed before administrative Law Judge Mary Ellen Bittner. On March 5, 1996, Judge Bittner issued an Order for Prehearing Statements. On March 14, 1996, in lieu of filing such a statement, the Government filed a motion for summary disposition, which was accompanied by a copy of the Board of Medical Examiners of the State of Arizona's (Board) Findings of Fact, Conclusions of Law and Order of Revocation dated January 26, 1994. Also attached to the Government's motion was a copy of a letter from a medical investigator for the Board to DEA dated August 31, 1995, stating that Respondent's license to practice medicine in Arizona remained revoked. In addition, Government counsel represented in its motion that on March 14, 1996, he had telephonically contacted the Board and confirmed that Respondent's license to practice medicine in Arizona had not been restored.

On March 14, 1996, Judge Bittner issued an order providing Respondent up to and including April 5, 1996, to file a response to the Government's motion. However, the Respondent did not file a response, and on April 30, 1996, Judge Bittner issued her Opinion and Recommended Decision. Judge Bittner found that Respondent lacked authorization to handle controlled substances in the State of Arizona; granted the Government's motion for summary disposition; and recommended that Respondent's DEA Certificate of Registration be revoked. Neither party filed exceptions to her decision, and on May 30, 1996, Judge Bittner transmitted the record of these proceedings to the Deputy Administrator.

The Acting Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 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, in full, the Opinion and Recommended Ruling of the Administrative Law Judge.

The Acting Deputy Administrator finds that on January 26, 1994, the Board of Medical Examiners for the State of Arizona revoked Respondent's license to practice medicine in the State of Arizona. Therefore, Respondent is not currently authorized to handle controlled substances in the State of Arizona. The Drug Enforcement Administration lacks statutory authority to issue or maintain the registration of a practitioner who is not duly authorized to handle controlled substances in the state in which he conducts has practice. 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. See *Therial L. Bynum, M.D.,* 61 FR 3948 (1996); *Charles L. Novosad, Jr., M.D.,* 60 FR 47182 (1995); *Dominick A. Ricci, M.D.,* 58 FR 51104 (1993).

Judge Bittner also properly granted the Government's motion for summary disposition. Respondent did not file a response to the Government' motion. Respondent presented no evidence to contradict the fact that his license to practice medicine in the State of Arizona has been revoked, and therefore he is unable lawfully to handle controlled substances in that state. It is well-settled that when no question of fact is involved, a plenary, adversary administrative proceeding involving evidence and cross-examination of witnesses is not obligatory. See *Philip E. Kirk, M.D.,* 48 FR 32887 (1983), *aff'd sub nom Kirk* v. *Mullen,* 749 F.2d 297 (6th Cir. 1984; see also *NLRB* v. *International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO,* 549 F.2d 634 (9th Cir. 1977).

Therefore, having considered the facts and circumstances in this matter, the Acting Deputy Administrator concludes that Respondent's DEA Certificate of Registration should be revoked due to his lack of authorization to handle controlled substances in the State of Arizona.

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 CFR 0.100(b) and 0.014, hereby orders that DEA Certificate of Registration, AA2034306, previously issued to Jonathan Agbebiyi, M.D., be, and it hereby is, revoked, and that any pending applications for renewal of such registration be, and they hereby are, denied. This order is effective January 9, 1997.

Dated: December 3, 1996.

James S. Milford,

Acting Deputy Administrator.

[FR Doc. 96–31251 Filed 12–9–96; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 94–41]

Anibal P. Herrera, M.D.; Continuation of Registration with Restriction

On August 31, 1994, the Deputy Assistant Administration, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Anibal P. Herrera, M.D. (Respondent) of Middletown, New York, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration, AH3517298, under 21 U.S.C. 824(a)(5), and deny any pending applications for renewal of such registration as a practitioner, under 21 U.S.C. 823(f), for reason that he has been excluded from participation in a program pursuant to 42 U.S.C. 1320a–7(a).

By letter dated September 19, 1994, the Respondent, acting *pro se,* filed a timely request for a hearing, and following prehearing procedures, a hearing was held in New York, New York on April 27, 1995, before Administrative Law Judge Mary Ellen Bittner. At the hearing, both parties called witnesses and introduced documentary evidence. After the hearing, Government counsel submitted proposed findings of fact, conclusions of law and argument. On July 13, 1995, an attorney entered a notice of appearance

as counsel for Respondent, and submitted proposed findings of fact, conclusions of law, and argument. In addition, the Administrative Law Judge considered as post-hearing filings letters submitted by Respondent dated May 29 and June 30, 1995, and the Government's response dated June 12, 1995. On March 12, 1996, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision, recommending that Respondent's DEA Certificate of Registration be restricted to require the submission of a log of his controlled substance handling on a quarterly basis for three years. On April 1, 1996, Government counsel filed exceptions to Judge Bittner's Opinion and Recommended Ruling, and on April 17, 1996, the record of these proceedings was transmitted to the Deputy Administrator. Subsequently, on April 22, 1996, Respondent's counsel requested an extension of time to file a response to the Government's exceptions, which was granted on April 29, 1996. Respondent then filed his response to the Government's exceptions on May 8, 1996.

The Acting Deputy Administrator has considered the record in its entirety, including the Government's exceptions and Respondent's response thereto, and pursuant to 21 CFR 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, with one noted exception, the Opinion and Recommended Ruling, Findings of Facts, and Conclusions of Law and Decision of the Administrative Law Judge. His adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Acting Deputy Administrator finds that Respondent is a physician specializing in psychiatry. He graduated from the University of Buenos Aires Medical Center in 1955 and came to the United States in 1958, receiving his license to practice medicine in New York in 1965. He held various positions at local psychiatric centers and a local hospital, including staff psychiatrist, supervisor, unit chief, and director of psychiatric service at the hospital, until he retired in 1989. Since his retirement, Respondent has had a part-time psychiatric practice in Orange County, New York which has a Spanish speaking population of about 20,000. Respondent testified at the hearing before Judge Bittner that he was the only Spanish speaking physician in the county that would prescribe medication and provide counseling when needed.

In 1991, the New York Deputy Attorney General for Medicaid Fraud initiated an investigation of Respondent because his Medicaid billing was high for psychiatrists in his geographic area. A provider profile of Respondent's Medicaid billings for 1988 through 1992, revealed that almost all of the claims specified the code 90844 with the modifier ''WA''. During the time period covered by the investigation, the code 90844 represented psychiatric service of approximately 45–50 minutes with a minimum of 37 minutes, and provides for a $25.00 fee. The ''WA'' indicated that the service was rendered in an office setting and allows the provider to bill an additional $5.00. Other codes were available for other types and lengths of services. Prior to 1988, a different code was used for services similar to those covered by code 90844. Providers are furnished a manual with billing guidelines. Revisions to the code are made periodically and providers are sent code changes in their specialty field.

As part of the investigation of Respondent, an undercover investigator went to Respondent's office on approximately 15 occasions between May 1991 and June 1992. The undercover investigator presented legitimate medical reasons for the visits and was prescribed Xanax, a controlled substance. The Acting Deputy Administrator concludes that Respondent's proper prescribing of controlled substances to the undercover investigator is not an issue in these proceedings. The purpose of these visits was to determine whether Respondent was properly billing Medicaid based upon the amount of time spent with his Medicaid patients.

The first two undercover visits were for 24 and 20 minutes respectively, and Respondent billed Medicaid using the code 90844. An investigator that testified at the hearing before Judge Bittner stated that although these visits were shorter than the required 37 minutes, they were long enough that investigators ''didn't make anything out of that.'' The third visit lasted 14 minutes and the remaining visits ranged from between 4 and 10 minutes. The investigator testified that Respondent billed Medicaid using the Code 90844 for all of these visits despite their duration. The Administrative Law Judge found, and the Acting Deputy Administrator concurs that the record is not clear as to whether Respondent in fact billed Medicaid for two of these visits.

Before the last undercover visit on June 11, 1992, two investigators went to Respondent's office in their official capacity to discuss his billing practices. Respondent told the investigators that he had been participating in the Medicaid system since the 1960's and had always been reimbursed $30.00 for an office visit. Respondent stated that he had received the Medicaid manuals and updates and even showed them to the investigators. Respondent told the investigators that Medicaid patients accounted for 50% of his practice and that his secretary handles the office billing. Respondent initially told the investigators that he spent 30 to 35 minutes or longer with his Medicaid patients depending on their needs. Respondent was then asked whether he ever gave his patients less time and he stated that he sometimes only spent 20 to 30 with those patients. When the investigators revealed that they had conducted surveillance of his office, Respondent admitted that he had not spent the required amount of time with his Medicaid patients. Respondent stated however, that he did not look at his watch, but gave each patient as much time as needed. During this interview, Respondent never stated that he was purposely overbilling the Medicaid system, but he accepted responsibility for the billing.

Later on June 11, 1992, the undercover investigator made her last visit to Respondent's office. During this visit, the undercover investigator told Respondent that she had received a letter from the Department of Social Services questioning how much time she spent in her sessions with Respondent. The Government asserts that the tape recording of this visit indicates that Respondent told the undercover investigator to lie about the amount of time spent with Respondent. Respondent submitted a certified transcript of the recording which indicates that Respondent said, ''[y]ou cannot lie.'' The Acting Deputy Administrator concurs with Judge Bittner's finding that Respondent told the investigator, ''[y]ou cannot lie.''

On several occasions, while waiting to see Respondent, the undercover investigator timed other patients, and observed that they spent between 6 and 20 minutes with Respondent. The Acting Deputy Administrator agrees with Judge Bittner however, that there is no evidence in the record that these were Medicaid patients, and therefore does not find that these observations are relevant to this proceeding.

As part of the investigation, approximately 25 of Respondent's Medicaid patients filled out

questionnaires indicating the amount of time spent with Respondent. The questionnaires are not in evidence; however, the investigator testified that the answers varied, ''but the majority was like about 15 minutes or so.''

As a result of the investigation, Respondent was convicted on December 3, 1992, in the City Court of Middletown, County of Orange, State of New York, following this guilty plea of filing a false instrument in the second degree, a misdemeanor, in violation of section 175.30 of the Penal Law of the State of New York. Respondent was ordered to pay a fine and restitution of $22,000, which was the estimated amount of Respondent's overbilling to Medicaid. Respondent paid both the fine and the restitution amount.

An element of the offense for which Respondent was convicted is ''*knowing* that a written instrument contains a false statement or false information.'' N.Y. Penal Law section 175.30 (emphasis added). Respondent testified at the hearing before Judge Bittner that he did not know that the claims were false when he submitted them to Medicaid, but pled guilty because he accepted responsibility for improperly billing. He further testified that his plea resulted from bad legal advice and a desire to put the episode behind him. Respondent testified before Judge Bittner, and argues in his post-hearing filing, that he entered an *Alford* plea to the charge against him, whereby he admitted the facts, but not the criminal intent. See, *North Carolina* versus *Alford*, 91 S.Ct. 160 (1970). Other than Respondent's testimony, there is no other evidence in the record regarding the circumstances surrounding Respondent's guilty plea and its acceptance by the court.

Respondent explained that he had always billed Medicaid $30.00 for each session. According to Respondent, in the 1970's, if there was an approved treatment plan on file for a patient, a doctor could bill Medicaid $30.00 for each session regardless of the duration of the session. In 1985, the system changed and treatment plans were no longer required, and billing codes were established based upon the type and duration of service. Respondent claims that he was not aware of the time requirements. He testified that he told his part-time secretary who handles his billing to bill Medicaid $30.00 for each Medicaid patient he saw. The secretary looked for the appropriate billing code that reimbursed for $30.00, which was 90844.

As a result of his conviction, the United States Department of Health and Human Services excluded Respondent from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grant, and Block Grants to States for Social Services programs for a period of 5 years effective 20 days after June 21, 1993. This is a mandatory exclusion pursuant to 42 U.S.C. 1320a–7(a).

On March 27, 1995, the State Board for Professional Medical Conduct for the State of New York suspended Respondent's license to practice medicine for three years, but stayed the suspension and placed his license on probation, during which time his billing records will be closely monitored.

Respondent testified that there have never been any complaints about his treatment of patients, and there have never been any malpractice suits or civil actions brought against him. He introduced 80 letters of support from patients and other doctors. All of the patients stated that they were very happy with Respondent's services, and many emphasized that Respondent gave them the time that they needed. Respondent testified before Judge Bittner that revocation of his DEA Certificate of Registration would impair his ability to properly treat his patients.

The Deputy Administrator may revoke or suspend a DEA Certificate of Registration under 21 U.S.C. 824(a), upon a finding that the registrant:

(1) Has materially falsified any application filed pursuant to or required by this subchapter or subchapter II of this chapter;

(2) Has been convicted of a felony under this subchapter or subchapter II of this chapter or any other law of the United States, or of any State relating to any substance defined in this subchapter as a controlled substance;

(3) Has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized by State law to engage in the manufacturing, distribution, or dispensing of controlled substances or has had the suspension, revocation, or denial of his registration recommended by competent State authority;

(4) Has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section; or

(5) Has been excluded (or directed to be excluded) from participation in a program pursuant to section 1320a–7(a) of Title 42.

It is undisputed that subsection (5) of 21 U.S.C. 824(a) provides the sole basis for the revocation of Respondent's DEA Certificate of Registration. Pursuant to 42 U.S.C. 1320a–7(a), Respondent has been excluded from participation in the Medicare, Medicaid, Maternal and Child Health Services Block Grants to States for Social Services programs for a five-year period until approximately mid-July 1998. The issue remaining is whether the Acting Deputy Administrator, in exercising his discretion, should revoke or suspend Respondent's DEA Certificate of Registration.

The Government contends that Respondent's registration should be revoked since he continues to deny that he intentionally overbilled Medicaid and therefore has shown no remorse for his actions. Respondent does not deny that he overbilled Medicaid and that he was convicted of filing a false instrument. Respondent contends, however, that he did not overbill Medicaid intentionally, and that he did not admit intent when he pled guilty, but did so to accept responsibility for the improper billing and to put the matter behind him. Respondent also argues that his DEA registration should not be revoked because there has never been a complaint about his practice of medicine and his services are badly needed in the community in which he practices.

The Administrative Law Judge recommended that Respondent's registration not be revoked, but that he be required to submit a log of his controlled substance handling on a quarterly basis for three years. Judge Bittner found that Respondent has admitted that he overbilled Medicare for some or all of the undercover visits, and for most of his other patients, and that his explanation for the overbilling is plausible. In her opinion, Judge Bittner addressed the Government's contention that Respondent's assertion of lack of knowledge of the proper Medicaid billing codes is not credible. The Government, in its brief as well as its exceptions, points to the investigator's testimony that Respondent changed his story as to the amount of time spent with Medicaid patients after learning that his office had been under surveillance; admitted to reading the Medicaid manuals; stated that he believed that the Medicaid system lent itself to wrongdoing; and told the undercover investigator to lie about the amount of time spent with Respondent. However, as Judge Bittner notes in her opinion, the Respondent testified that he told the investigator that he accepted responsibility for the overbilling; that he did not tell the investigator that he read the Medicaid manual; that he did not recall stating that the Medicaid system lent itself to dishonesty; and that the tape recording of the last visit of the undercover officer did not indicate that Respondent told the investigator to lie, but on the contrary stated that ''[y]ou cannot lie.'' Judge Bittner then concluded that she could not find that the investigator's recollection of the

interview was more accurate than Respondent's, and therefore could not find that Respondent was lying in his explanation of his billing practices.

The Acting Deputy Administrator agrees with Judge Bittner's conclusion. The Government continues to argue in its exceptions that it is significant that Respondent changed his story during his interview on June 11, 1992, regarding the amount of time spent with his Medicaid patients. The Acting Deputy Administrator does not find this troubling, since Respondent also stated during the interview that he was not one to look at his watch.

The Administrative Law Judge found that even though Respondent was convicted for filing a false instrument, he was not estopped from denying that he knew that his billing was wrong since ''the doctrine of issue preclusion applies only to issues actually litigated in an earlier proceeding.'' Judge Bittner went on to conclude that since Respondent pled guilty, the element of his knowledge was not actually litigated.

The Government filed an exception to this conclusion arguing that ''it is axiomatic that one who pleas [sic] guilty admits to all essential elements of the offense * * * '' and that ''DEA has consistently over a long period of time construed a guilty plea as an admission of the elements of that offense.'' The Government expressed concern that to adopt the Administrative Law Judge's conclusion, ''DEA would now allow registrants and applicants to collaterally attack convictions based upon guilty pleas in administrative revocation proceedings.'' In its response to the Government's exceptions, Respondent's counsel argues that Respondent entered an *Alford* plea to the misdemeanor of filing a false record in a court that is not a court ''of record'' and therefore there is no record surrounding Respondent's plea. Respondent maintain that all of the cases cited by the Government for the proposition that DEA should not ''go behind'' guilty please involved pleas to felony offenses which required an allocution in a court of record. Respondent further argues that by entering an *Alford* plea, Respondent ''pled to the underlying facts without acknowledging fraudulent intent in positioning those admitted acts.'' ''He did *not* admit to the offense, he admitted to the facts set forth in the indictment * * * (and t)here is no allocution on which to base a contrary finding inasmuch as he was allowed to plea in an arraignment court * * * .''

The Acting Deputy Administrator cannot concur with the Administrative Law Judge's conclusion that if a registrant or applicant's conviction is the result of a guilty plea, he/she is not precluded from arguing in the administrative proceedings any issues relating to the conviction since they were not actually litigated in an earlier proceeding. As the Government points out in its exceptions, DEA has consistently construed a guilty plea as an admission of the elements of the offense. In *Pearce* v. *United States Department of Justice*, 867 F.2d 253 (6th Cir. 1988), a physician's revocation was affirmed where the physician argued that even though he pled *nolo contendere* to a drug related felony, he was not really guilty of the charges since the prescriptions in question were issued for a legitimate medical purpose. In rejecting the physician's argument, the United States Court of Appeals stated that:

> The statute, however, does not require the government to prove the substance of the criminal violation at the administrative hearing. The purpose of the hearing is not to give the petitioner a chance to go behind or to set aside a guilty plea, or the equivalent of a guilty plea, in this case. Id. at 255.

However, the Acting Deputy Administrator is uncomfortable in this case with precluding Respondent from arguing that he did not intend to file false Medicaid claims. Respondent argues that he entered an *Alford* plea to the misdemeanor charge of filing a false instrument whereby he admitted the facts in the indictment, but not the elements of the offense. Respondent does not argue that there was no conviction, but argues that his plea was entered and accepted by a state arraignment court where there was no allocution surrounding the plea. Given the confusion over what exactly Respondent admitted, and without more evidence in the record regarding the exact circumstances surrounding Respondent's plea, the Acting Deputy Administrator is unable to determine if he's precluded from exploring Respondent's intent when filing the false claims. Consequently, the Acting Deputy Administrator has considered Respondent's explanation regarding his overbilling of Medicaid.

The Acting Deputy Administrator finds that the Drug Enforcement Administration has previously held that misconduct, like that at issue in this proceeding, which does not involve controlled substances may constitute grounds under 21 U.S.C. 824(a)(5) for the revocation of a DEA Certificate of Registration. See *Gilbert L. Franklin, D.D.S.*, 57 FR 3441 (1992); *George D. Osafo, M.D.*, 58 FR 37508 (1993); *Nelson Ramirez-Gonzalez, M.D.*, 58 FR 52787 (1993). However, in those cases, there were serious questions as to the integrity of the registrant.

The Acting Deputy Administrator finds that in this case, Respondent advanced a plausible explanation for his overbilling, yet never denied that he did in fact overbill the Medicaid system. He has accepted full responsibility for the filing of the claims and has paid restitution to the State of New York. In addition, given the needs of the community in which he practices and the action already taken by the Department of Health and Human Services regarding his Medicaid privileges and by the State of New York regarding his license to practice medicine, the Acting Deputy Administrator agrees with Judge Bittner that revocation of Respondent's DEA registration is not appropriate.

The Administrative Law Judge recommended that in light of Respondent's failure to comply with laws related to his medical practice, it is appropriate for DEA to monitor Respondent's handling of controlled substances. Judge Bittner therefore recommended that for three years following issuance of the final order, the following restriction be placed on Respondent's DEA registration:

> At the end of every calendar quarter, Respondent must submit a log of all controlled substances he has prescribed, administered, or otherwise dispensed during the previous quarter to the Special Agent in Charge of the nearest DEA office or his designee. The log shall include each patient's name, address, date of prescription or other dispensing, and the name and quantity of the controlled substance. The log shall be prepared by and signed by Respondent personally, except that he may ask an employee to verify its accuracy.

The Government filed an exception to this recommended disposition, contending that since there are no allegations that Respondent improperly handled controlled substances, maintenance of a log would be unnecessary. The Acting Deputy Administrator disagrees with the Government and agrees with Judge Bittner ''that some controls are necessary to ensure that he complies with laws relating to his dispensing and prescribing 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 U.S.C. 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AH3517298, issued to Anibal P. Herrera, M.D., be continued, and any pending applications be granted, subject to the

above restriction. This order is effective December 10, 1996.

Dated: December 2, 1996.

James S. Milford,

Acting Deputy Administrator.

[FR Doc. 96–31252 Filed 12–9–96; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 95–4]

Roger Pharmacy; Revocation of Registration

On October 7, 1994, the Deputy Assistant Administrator. Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to show Cause to Roger Pharmacy (Respondent) of Gahanna, Ohio, notifying the pharmacy of an opportunity to show cause as to why DEA should not revoke its DEA Certificate of Registration, BR1448655, and deny any pending applications for renewal of such registration as a retail pharmacy under 21 U.S.C. 823(f), for reason that the pharmacy's continued registration would be inconsistent with the public interest pursuant to 21 U.S.C. 824(a)(4).

On November 2, 1994, the Respondent, through counsel, filed a timely request for a hearing, and following prehearing procedures, a hearing was held in Cleveland, Ohio on June 27, 1995, before Administrative Law Judge Mary Ellen Bittner. At the hearing, both parties called witnesses to testify, and the Government introduced documentary evidence. After the hearing, counsel for both parties submitted proposed findings of fact, conclusions of law and argument. On April 9, 1996, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision, recommending that Respondent's DEA Certificate of Registration be revoked. Neither party filed exceptions to her decision, and on May 10, 1996, Judge Bittner transmitted the record of these proceedings to the Deputy Administrator.

The Acting Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 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, in full, the Findings of Fact, Conclusions of Law, and Recommended Ruling of the Administrative Law Judge, and his adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Acting Deputy Administrator finds that Jon R. Martin, R.Ph. purchased Respondent pharmacy, located in Gahanna Ohio, in the late 1980's. Respondent is a high volume drug store that employees 10 to 15 individuals, and provides services not generally available from chain pharmacies, such as charge accounts and deliveries to the elderly.

In November 1990, a detective with the Narcotics Bureau of the Columbus, Ohio Police Department conducted a routine inspection of Respondent pharmacy and its exempt narcotics log book. Under both Federal and state law a prescription is not required to purchase certain Schedule V cough syrups, however a log book must be maintain containing the name and address of the purchaser, the name and quantity of the controlled substance purchased, the date of purchase, and the name of the dispensing pharmacist. In addition, there is a limit on the amount of cough syrup that may be purchased by an individual within a 48 hour period. The inspection revealed that on 11 occasions, between February 1989 and November 1990, individuals had purchased Schedule V exempt narcotic cough syrups from Respondent more than once in a 48 hour period in violation of both Federal and state law. Further examination of Respondent's exempt narcotic log book revealed that certain individuals bought exempt narcotics from Respondent frequently and over an extended period of time. Specifically, between February 20, 1989 and November 18, 1990, an individual purchased exempt narcotics from Respondent on 126 occasions; between March 24, 1989 and February 7, 1990, an individual purchased exempt narcotics from Respondent on 63 occasions; another individual purchased exempt narcotics from Respondent on 97 occasions between January 2, 1989 and February 3, 1991; between January 15, 1989 and December 29, 1990, an individual purchased exempt narcotics from Respondent on 104 occasion; an individual purchased exempt narcotics on 87 occasions between January 16, 1989 and February 10, 1991; and another individual purchased exempt narcotics from Respondent on 34 occasions between August 25, 1990 and February 2, 1991.

The detective interviewed three of these individuals who all admitted purchasing exempt narcotics from Respondent. One stated that when he went to Respondent, there would be a bottle of cough syrup waiting for him by the time he reached the pharmacy counter. Another individual admitted to signing the log book using different names.

On January 30, 1991, the detective interviewed Jon Martin, Respondent's owner and pharmacist, and asked him how long it would take someone to become addicted to codeine if he/she drank a bottle of cough syrup every day or every other day. Mr. Martin stated that in his opinion it would take approximately 60 days. The detective then asked Mr. Martin why he continued to sell cough syrup to the same individuals. Mr. Martin replied that as long as customers stayed within the 48 hour rule, he would sell the cough syrup to them because if he did not, they would just buy it elsewhere. Mr. Martin went on to state that the pharmacy business is a tough business and he might as well make money.

In April 1991, the Columbus Police Department informed DEA of the results of its investigation of Respondent. DEA compared the amount of exempt narcotics sold by Respondent with the amount sold by the other five pharmacies located in Gahanna, Ohio, and discovered that during an average month in 1991, Respondent sold twice the quantity of exempt narcotic products as all the other local pharmacies combined. On April 18, 1991, DEA went to Respondent pharmacy to evaluate its compliance with the Controlled Substances Act. It was discovered that Respondent did not have a biennial inventory as required by Federal regulations. At the hearing before Judge Bittner, when asked about this Respondent stated that, ''I suspect it was just a matter of being a little lax on getting things done. It was nothing intentional. There's a lot of things for me to do. * * * Some of them are nit-picky things I neglected doing. I'm sorry.'' The DEA investigators also discovered that Respondent could not account for 18 of the 126 Schedule II order forms that it had been issued by DEA between January 1989 and April 1991. Respondent testified at the hearing before Judge Bittner that he was surprised that the order forms were missing, and that ''paperwork has not always been one of (his) strong suits.''

As part of its investigation, DEA conducted an accountability audit at Respondent pharmacy of eight controlled substances. The audit revealed both overages and shortages of all but one of the audited substances. For example, Respondent pharmacy could account for 164 tablets of Dilaudid 2 mg. (a Schedule II controlled substances) more than it was accountable, and could not account for 1,160 tablets of APAP with codeine (a Schedule III controlled substance) for