the diagnosis made and the treatment performed for and upon each of his or her patients for reference and for protection of the patient for at least five years following the completion of treatment.'' Tex. Admin Code tit. 22, § 375.21(a). When, however, Investigators executed the search warrant at Respondent's registered location, Respondent did not have any medical records for M.P., H.G., K.B., and N.B., even though he had prescribed large quantities of codeine/apap to M.P. (4,230 d.u.) and H.G. (3,180 d.u.) and large quantities of hydrocodone/apap to K.B. (1,500 d.u.) and N.B. (1,515 d.u.). Moreover, Respondent had prescribed to these persons for between a year and a half (in N.B.'s case) and two and a half years (in M.P.'s case). Based on Respondent's failure to maintain any medical records, let alone document a diagnosis to support his prescribing of controlled substances to M.P., H.G., K.B., and N.B., I conclude that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose when he prescribed controlled substances to these patients and thus violated the CSA. 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a). I also conclude that Respondent violated the Texas Board's regulation requiring that he ''make, maintain, and keep accurate records of the diagnosis made and the treatment performed for'' each of these patients. Tex. Admin Code tit. 22, § 375.21(a).

As for D.C., while the Investigators found a medical record, the progress notes did not document a diagnosis and contained no information other than D.C.'s name, date of birth, his age, and the date of the visit. Notwithstanding his failure to document a diagnosis, Respondent issued D.C. prescriptions for 2,260 d.u. of hydrocodone/apap over a nearly two and one half year period. Here again, I conclude that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in prescribing hydrocodone/apap to D.C. and violated the CSA in doing so. 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a). Here too, Respondent also violated the Texas Board's rule.

While P.P.'s medical record contained a progress note documenting a diagnosis, this note was dated February 19, 2007. However, Respondent had prescribed hydrocodone/apap to her since February 2005, and had authorized the dispensing of more than 3,300 dosage units to her before he even documented a diagnosis. Here again, I conclude that these prescriptions were issued outside of the usual course of professional practice and lacked a legitimate medical purpose and thus violated the CSA. 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a). And here too, Respondent violated the Board's rule by failing to document a diagnosis between February 2005 and February 2007.

I therefore conclude that Respondent's experience in dispensing controlled substances (factor two), his failure to comply with the CSA's prescription requirement, 21 CFR 1306.04(a) (factor four) and his failure to comply with the Texas Board's rule (factor five [5]), establish that Respondent's registration ''would be inconsistent with the public interest.'' 21 U.S.C. 823(f). This conclusion provides an additional and independent ground for denying Respondent's application. Accordingly, Respondent's application for a new DEA Certificate of Registration will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b), I order that the application of Shannon L. Gallentine, D.P.M., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, denied. This Order is effective immediately.

Dated: July 22, 2011.

Michele M. Leonhart,

Administrator.

[FR Doc. 2011–19381 Filed 7–29–11; 8:45 am]

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[5] As the Texas rule states, ''All podiatric physicians shall make, maintain, and keep accurate records of the diagnosis made and the treatment performed for and upon each of his or her patients for reference and *for protection of the patient* for at least five years following the completion of treatment.'' Tex. Admin Code tit. 22, § 375.21(a). DEA has also held that a practitioner's failure to maintain medical records required by state law constitutes such other conduct which may threaten public health and safety. *See Robert L. Dougherty,* 60 FR 55047, 55050–51 (1995).

The Government also asserts that Respondent materially falsified his application for a state controlled substances registration because he failed to disclose the surrender of his DEA registration. Req. for Final Agency Action, at 14. This allegation was not, however, made in the Order to Show Cause, and the ALJ's various orders make clear that the Government did not file a Pre-Hearing Statement, in which it might have provided the requisite notice. *See CBS Wholesale Distributors,* 74 FR 36746, 36749–50 (2009); *see also* 5 U.S.C. § 554(b) (''Persons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted.''). I therefore do not consider it.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 10–39]

Michael S. Moore, M.D.; Suspension of Registration

On October 4, 2010, Administrative Law Judge John H. Mulrooney, II, issued the attached recommended decision. Neither party filed exceptions to the decision.

Having reviewed the record in its entirety, I have decided to adopt the ALJ's rulings, findings of fact, and conclusions of law except for his conclusion regarding the applicability of factor five.[1] *See* ALJ Dec. at 21–22.[2] For the reasons explained below, I adopt in part and reject in part the ALJ's recommended order that I suspend Respondent's registration for a period of six months and impose various conditions on his registration. Instead, I conclude that Respondent's registration should be suspended for a period of one year and impose two of the four conditions recommended by the ALJ.

The record in this case establishes that Respondent was convicted of a felony offense under Wisconsin law ''relating to any substance defined in [the Controlled Substances Act] as a controlled substance.'' [3] 21 U.S.C. 824(a)(2). More specifically, Respondent has been convicted of the felony offense of unlawful manufacture, distribution or delivery of ''[t]wo hundred grams or less, or 4 or fewer plants containing tetrahydrocannabinols,'' in violation of Wis. Stat. § 961.41(1)(h)(1). ALJ Dec. at 4. Moreover, while Respondent was allowed to plead no contest to this charge, the evidence showed that Respondent had in his possession at least 1725 grams of marijuana, plus marijuana seeds, four marijuana plants, and the equipment needed to grow

[1] In light of the conduct proved on the record, a finding under factor five is not necessary to conclude that Respondent has committed acts which render his registration inconsistent with the public interest. *See Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005) (The Agency is ''not required to make findings as to all of the factors[.]'').

[2] All citations to the ALJ's Recommended Decision are to the slip opinion as issued on October 4, 2010.

[3] On July 14, 2011, Respondent's counsel notified this Office that he had completed his probation and that his conviction has been reduced to a misdemeanor. Be that as it may, under the public interest inquiry, DEA is also required to consider Respondent's compliance with applicable Federal and State laws related to controlled substances. *See* 21 U.S.C. 823(f)(4). As explained above, notwithstanding Respondent's completion of his probation and the reduction of his conviction to a misdemeanor, his conduct still constitutes a felony offense under Federal law. *See* 21 U.S.C. 841(a) & (b)(1)(D).

marijuana hydroponically. *Id.* at 8–9. The evidence also showed that Respondent had in his possession multiple marijuana pipes and pipe cleaners.[4] GX 7, at 30.

The evidence further showed that on numerous occasions, Respondent's niece (who was the legal ward of his wife) smoked marijuana with two boyfriends at Respondent's house and that on some occasions she provided the marijuana. GX 7, at 1, 7–8. Moreover, one of the boyfriends reported to the police that on two occasions, he observed marijuana leafs drying in the bedroom closet of Respondent's niece. *Id.* at 7.

As the ALJ recognized, the Government established a *prima facie* case for revocation on two separate grounds: (1) his felony conviction for manufacturing marijuana, and (2) his having committed acts which render his registration inconsistent with the public interest. ALJ at 22 (citing 21 U.S.C. 824(a)(2) & (4)). The ALJ correctly recognized that the burden then shifted to Respondent to demonstrate why revocation of his registration would be inappropriate and that he was ''required not only to accept responsibility for [his] misconduct, but also to demonstrate what corrective measures [he has] undertaken to prevent the reoccurrence of similar acts.'' *Id.* (quoting *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010)).

DEA has also repeatedly held that a registrant's candor during both an investigation and the hearing itself is an important factor to be considered in determining both whether he has accepted responsibility as well as the appropriate sanction. *Robert F. Hunt, D.O.,* 75 FR 49995, 50004 (2010); *see also Hassman,* 75 FR at 8236 (quoting *Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005) (''Candor during DEA investigations, regardless of the severity of the violations alleged, is considered by the DEA to be an important factor when assessing whether a physician's registration is consistent with the public interest[.]'') Moreover, in assessing an appropriate sanction, DEA also properly considers the need to deter others from engaging in similar acts and the egregiousness of the misconduct. *See Joseph Gaudio,* 74 FR 10083, 10094 (2009); *Southwood Pharmaceuticals, Inc.,* 72 FR 36487, 36504 (2007) (citing *Butz* v. *Glover Livestock Commission Co., Inc.,* 411 U.S. 182, 187–88 (1973)).

Here, the ALJ found that Respondent credibly testified that he was in compliance with the terms of his probation, as well as the terms of the Order of the Wisconsin Medical Board, which include that he undergo treatment and be subject to random drug testing. ALJ at 22. While the ALJ found that Respondent ''demonstrate[d] an acknowledgement that his actions were illegal,'' he further observed that ''Respondent's testimony at the hearing did not reflect a high level of contrition,'' and that ''true remorse, to the extent Respondent may possess it, was not patently evident from his presentation at the hearing.'' *Id.* at 23. As the ALJ further explained, ''[d]uring his testimony, the Respondent gave the distinct impression that he was not so much sorry about his transgression as he was sorry that he got caught and was laboring under the criminal and administrative consequences of that reality.'' *Id.*

In addition, I note that in his testimony, Respondent maintained that he ''never'' provided marijuana to his niece, that she had obtained it behind his back, and that he had no knowledge that she was using marijuana and doing so with others prior to when the police searched his house. Tr. 47–48. However, the ALJ found this testimony ''implausibl[e],'' ALJ at 11, as do I.[5] Based on the ALJ's finding, I further find that Respondent's testimony was not entirely candid. Thus, even giving weight to the ALJ's findings regarding Respondent's rehabilitation and his acceptance of responsibility, Respondent's lack of candor supports a substantial period of suspension.

In seeking the revocation of Respondent's registration, the Government cited three cases, each of which the ALJ distinguished on the grounds that the various practitioners had engaged in far more egregious misconduct either because they also ''had significant * * * prescribing anomalies,'' or because they were found to have grown far larger amounts of marijuana than Respondent. ALJ at 23–24. However, possession of a four pound stash of a schedule I controlled substance is nothing to sneeze at, and indeed, under Federal law, it is a felony offense punishable by up to five years imprisonment and a $250,000 fine. *See* 21 U.S.C. 841(a) & (b)(1)(D). Moreover, as explained above, this is not simply a case of self-abuse. Rather, the evidence is clear that Respondent distributed the marijuana to his wife,[6] and whether he actually physically delivered the drug to his niece, it is clear that she had ready access to it and also distributed it to at least one of her boyfriends.

In short, while many cases brought under sections 303 and 304 of the Controlled Substances Act,[7] involve registrants who have engaged in substantial unlawful distributions to others, Respondent's felonious conduct is nonetheless sufficiently egregious to warrant the revocation of his registration.[8] *See* 21 U.S.C. 824(a)(2) (authorizing Agency to suspend or revoke a registration based on conviction for felony related to controlled substance). Moreover, even though Respondent now appears to acknowledge most of his illegal behavior and has been in compliance with the State Board's Order, I agree with the ALJ that the Agency's interest in deterring similar misconduct on the part of others warrants a substantial period of outright suspension. However, because I disagree with the ALJ's recommendation that a six-month suspension sufficiently protects the Agency's interest in deterring misconduct on the part of others and also note Respondent's less than candid testimony regarding his niece's access and use of marijuana, I will order that Respondent's registration be suspended for a period of one year.[9] Further, while Respondent's renewal application will be granted (subject to the suspension of

[4] Respondent was also convicted of possession of drug paraphernalia, a misdemeanor offense under Wisconsin law. ALJ Dec. at 4 (citing Wis. Stat. § 961.573(1)).

[5] Having observed Respondent testify, the ALJ≥s finding is entitled to substantial deference. Beyond this, the finding is consistent with other evidence of record including the statement of one of the informants that whenever the subject of the marijuana plants would come up, Respondent's niece ''would say that she couldn't talk about it''; that on at least two occasions, he observed marijuana leaves drying in her closet; and that on another occasion, when he and the niece needed marijuana, she left the bedroom and returned with a large bud which ''was packed down dried.'' GX 7, at 13. Thus, it is clear that his niece had ready access to Respondent's marijuana; moreover, Respondent offered no explanation as to why he allowed his niece to have access to it. In any event, Respondent's testimony that he was unaware that she was using marijuana begs credulity.

[6] Respondent likewise maintained that his wife used marijuana because she thought it eased a medical condition, but then acknowledged that ''[s]he would have smoked it anyway.'' Tr. 61. Moreover, Wisconsin does not permit the so-called ''medical'' use of marijuana.

[7] 21 U.S.A. 823 and 824.

[8] Indeed, in *Alan H. Olefsky,* 57 FR 928 (1992), DEA revoked a practitioner's registration based on his have in presented (in a single act) two fraudulent prescriptions to a pharmacist for filling. Respondent's conduct is at least as egregious as, if not considerably more so than, the conduct which warranted revocation in *Olefsky.*

[9] In determining the appropriate sanction, I have also considered the June 14, 2011 letter written by the Langlade County District Attorney on Respondent's behalf which was submitted to this Office on July 14, 2011. However, other than the information that Respondent has completed his probation and the terms of his sentence, the remainder of the letter does not constitute newly discovered evidence and I give it no weight.

his registration as set forth above), I further adopt the following conditions as recommended by the ALJ:

(1) The Respondent will comply with the terms and conditions of his criminal sentence and the Order of the Wisconsin Medical Board that are currently in effect, as well as any conditions which may be imposed in the future by either the state court or the Wisconsin Medical Board; Respondent shall provide a copy of all reports which he is required to submit to the Wisconsin Medical Board or the Department Monitor to the local DEA office within five business days of the submission.

(2) Respondent shall agree and ensure that copies of all drug screening test results are submitted to the local DEA office, whether those tests are ordered by the state court, the Wisconsin Medical Board, or the approved drug and alcohol monitoring program in which he has enrolled pursuant to the Final Order of the Wisconsin Board.[10]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that the application of Michael S. Moore, M.D., to renew his DEA Certificate of Registration be, and it hereby is, granted subject to the conditions set forth above. I further order that the registration of Michael S. Moore, M.D., be, and it hereby is, suspended for a period of one year. This Order is effective August 31, 2011.

Dated: July 21, 2011.

Michele M. Leonhart,

Administrator.

James Hambuechen, Esq., for the Government;

David Madison, Esq., for the Respondent.

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

John J. Mulrooney, II, Administrative Law Judge. On February 26, 2010, the Drug Enforcement Administration (DEA) Deputy Assistant Administrator issued an Order to Show Cause (OSC) seeking revocation of the Respondent's Certificate of Registration (COR), Number BM6464147, as a practitioner, pursuant to 21 U.S.C. 824(a)(2) and (a)(4), and denial of any pending applications for renewal or modification of such registration, pursuant to 21 U.S.C. 823(f), alleging that the Respondent has been convicted of a felony and misdemeanor involving controlled substances, and that his continued registration is otherwise inconsistent with the public interest, as that term is used in 21 U.S.C. § 823(f). On March 23, 2010, the Respondent timely requested a hearing, which was conducted in Arlington, Virginia, on August 31, 2010.[11]

The issue ultimately to be adjudicated by the Deputy Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes by substantial evidence that Respondent's registration with the DEA should be revoked as inconsistent with the public interest as that term is used in 21 U.S.C. 823(f) and 824(a)(4). The Respondent's DEA COR is set to expire by its terms on January 31, 2011.

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions below.

The Evidence

The OSC issued by the Government alleges that revocation of the Respondent's COR is appropriate because of the Respondent's April 9, 2009 no contest plea to a felony charge of manufacturing and delivering tetrahydrocannabinols (THC),[12] and a misdemeanor charge of possession of drug paraphernalia, both of which, according to the Government's allegations, constitute criminal convictions that ''arose from [the Respondent] growing large amounts of marijuana at [Respondent's] home, which was discovered upon the execution of a search warrant on August 3, 2007.'' [13]

At the hearing, the Government presented the testimony of DEA Diversion Investigator (DI) Thomas B. Hill, in support of its case for revocation. Through DI Hill's testimony, the Government introduced the Final Decision and Order relative to the Respondent which was issued by the Wisconsin Medical Examining Board (Wisconsin Medical Board) on October 17, 2007. Gov't Ex. 3; Resp't Ex. 7; Tr. at 20. That document contains the Respondent's stipulation to the Wisconsin Medical Board's factual finding that, on August 3, 2007, he ''possess[ed] tetrahydrocannabinol, a Schedule I controlled substance, not in the course of professional practice, and without any other authorization to do so,'' and that said conduct ''violated Wis. Stat. § 961.41(3g) [possession of controlled substance], Wis. Adm. Code § Med 10.02(2)(p) [obtaining controlled substance outside legitimate practice], and (z) [violation of related law or rule],'' and that ''[s]uch conduct constitutes unprofessional conduct within the meaning of the Code and statutes.'' Gov't Ex. 3 at 1–2; Resp't Ex. 7 at 1–2. As a result of these factual findings and conclusions of law, the Respondent's state medical license was indefinitely suspended for a period of at least five years, subject to a stay of that suspension, which was conditioned upon the Respondent remaining in compliance with certain conditions and limitations contained in the Order. The conditions of the stay include rehabilitation, drug monitoring, and treatment regimens, all of which are directed to be conducted at his expense. The regimens set forth in the Wisconsin Medical Board's Order require the Respondent to, *inter alia,* attend individual and/or group therapy sessions, attend weekly Narcotics and/or Alcoholic Anonymous meetings, abstain from all personal use of alcohol, abstain from controlled substances ''except when prescribed, dispensed or administered by a practitioner for a legitimate medical condition,'' notify his designated treating physician and the Department Monitor within twenty-four hours of ingestion or administration of any and all medications and drugs, provide those officials with any associated prescription, and submit to drug and alcohol urinalysis screens at a frequency of not less than ninety-six times per year for the first year of the program. Gov't Ex. 3 at 3–4; Resp't Ex. 7 at 3–4. With respect to practice limitations, the Wisconsin Medical Board's Order limits the Respondent's practice of medicine to serving as an emergency physician in a Board-approved setting, and prohibits him from prescribing or ordering

[10] Because the Wisconsin Board imposed extensive drug testing on Respondent in its final order, and Respondent has passed each of these tests, I conclude that it is unnecessary to subject Respondent to additional drug testing. For this reason, as well as that there is no evidence that Respondent has diverted controlled substances in his professional capacity, I conclude that is unnecessary to require as a condition of his registration, that he agree to warrantless searches of his residence and principal place of business.

[11] Following the unexpected and unfortunate passing of the Gene Linehan, Esq., who had represented the Respondent at and prior to the hearing in this matter, representation was undertaken by current counsel, David Madison, Esq., an attorney who was associated with Mr. Linehan's law firm.

[12] A Schedule I controlled substance. 21 U.S.C. 812; 21 CFR 1308.11.

[13] Initially, the OSC also alleged that a positive urinalysis result rendered the Respondent in violation of the terms of an October 17, 2007 Final Decision and Order of the State of Wisconsin Medical Examining Board (Wisconsin Medical Board), requiring him to abstain from the personal use of controlled substances without a legitimate prescription. At the outset of the hearing, however, the Government withdrew that allegation. ALJ Ex. 11; Tr. at 12–14, 82.

controlled substances outside of that setting. Furthermore, the Order forbids the Respondent from the administering or dispensing of all controlled substances, and provides that all controlled substance orders issued by Respondent through his practice as an emergency physician ''shall be reviewed by another physician within twenty-four hours of issuance, in a manner which documents the review.'' Gov't Ex. 3 at 4; Resp't Ex. 7 at 4.

Through the testimony of DI Hill, the Government also introduced various documents obtained from the Wisconsin Court system relative to the Respondent's state criminal case, which arose out of the same conduct at issue in the state medical board proceedings. Gov't Ex. 6. Those documents reflect that on April 9, 2009, the Respondent entered a no contest plea [14] to Wisc. Stat. § 961.41(1)(h)(1), Manufacturing or Delivering [15] less than or equal to 200 grams of THC (a felony), and Wisc. Stat. § 961.573(1), Possession of Drug Paraphernalia (a misdemeanor), and, pursuant to that plea, was found guilty of both charges. *Id.* The documents reflect that the Respondent was sentenced to probation (sentence withheld two years), conditioned upon serving thirty days at Langlade County Jail with work-release privileges, 160 hours of community service, a monetary fine, a six month suspension of his driver's license, and several other terms. *Id.* at 3–4.

The transcript of the state court guilty plea was offered by the Respondent and received into evidence.[16] Tr. at 67; Resp't Ex. 1. Although at his sentencing hearing, the Respondent provided an unsworn statement assuring the criminal trial judge that he ''never sold [marijuana and] never shared it,'' [17] the record contains the following comments from the trial judge on the subject:

> I don't totally accept that [the Respondent] was growing simply for his own use. I think it was for probably, in all likelihood, him and his guests of like mind, his wife, but I do agree I am looking at this, and I see to a large extent these are plants, seeds, stems. Looks to me that there's probably some processed here. Looks to be down to the buds that are in the plastic bags, and probably more than you would normally find.

Resp't Ex. 1 at 26.

The criminal sentencing transcript also reflects an acknowledgement by the trial court that, under Wisconsin law, the Respondent, upon successful completion of his probation, may apply to have the felony conviction reduced to a misdemeanor. Resp't Ex. 1 at 3. Although there is no indication in the record that such an application has been granted, is pending, or has even been submitted to competent state officials for action,[18] it is worthy of note that Agency precedent has long held that even a subsequent dismissal would not undermine the validity of a criminal conviction for purposes of the CSA. *Edson W. Redard, M.D.,* 65 FR 30616, 30618 (2000); *Stanley Alan Azen, M.D.,* 61 FR 57893, 57895 (1996). Thus, following his plea to felony manufacturing of tetrahydrocannabinol (THC), Respondent remains a convicted felon, ''convicted of a felony under [the law of Wisconsin] relating to * * * a controlled substance. * * *'' [19]

The Government, through the testimony of DI Hill, also introduced a packet containing information related to the state criminal case that culminated in the convictions that form the basis of the Wisconsin Board Order. Gov't Ex. 7. Specifically, the Government provided the search and arrests warrants associated with the August 3, 2007 arrest that resulted in the Respondent's conviction of felony manufacturing of THC and misdemeanor possession of drug paraphernalia, as well as the associated affidavits prepared by the executing state law enforcement officers.[20] Gov't Ex. 7 at 1–5. The Government also supplied numerous investigation reports, inventories and allied documents prepared by members of two local county law enforcement entities, and sworn, hand-written statements from current and former boyfriends of the Respondent's niece. *Id.* at 6–31, 42–46. Also included in the packet were numerous documents that the Government alleged were seized at the Respondent's residence in connection with the search warrant execution, and which, according to the Government, demonstrated the Respondent's participation in a significant marijuana growing operation. *Id.* at 32–41.

It is well-settled that hearsay may be correctly considered at an administrative hearing and may even support a finding of substantial evidence. *Richardson* v. *Perales,* 402 U.S. 389, 402 (1971) (signed reports prepared by licensed physicians correctly admitted at Social Security disability hearing); *Keller* v. *Sullivan,* 928 F.2d 227, 230 (7th Cir. 1991) (insurance company investigative reports correctly admitted in Social Security disability hearing where sufficient indicia of reliability established); *Calhoun* v. *Bailar,* 626 F.2d 145, 149 (9th Cir. 1980) (hearsay affidavits correctly admitted where indicia of reliability established). However, there are limits that circumscribe the admission and utility of hearsay evidence before an administrative tribunal. The touchstone is that before it may be used to support of finding of substantial evidence, the offered hearsay evidence must have sufficient reliability and credibility. Divining the correct use of hearsay evidence requires a balancing of four factors: (1) Whether the out-of-court declarant was not biased and had no interest in the outcome of the case; (2) whether the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) whether the information was inconsistent on its face; and (4) whether the information has been recognized by the courts as inherently reliable. *J.A.M. Builders* v. *Herman,* 233 F.3d 1350, 1354 (11th Cir. 2000).

Government Exhibit 7 divides analytically into five general categories of evidence: (1) A signed search and arrest warrant with its underlying supporting affidavit (executed by a local law enforcement officer) and some blank affiliated paperwork; [21] (2) two sworn statements apparently procured by local law enforcement personnel, signed by two individuals whom claim, respectively, to be the current and former boyfriend of the Respondent's niece (the boyfriends); [22] (3) unsigned typewritten police reports prepared by named local law enforcement personnel with apparent personal knowledge of the events contained therein, along with an apparently affiliated narcotics field

[14] A plea of no contest or *nolo contendere* that results in a judgment of conviction constitutes a conviction for purposes of the Controlled Substances Act (CSA). *Pearce* v. *DEA,* 867 F.2d 253, 255 (6th Cir. 1988); *Noell* v. *Bensinger,* 586 F.2d 554, 556–57 (5th Cir. 1978); *Sokoloff* v. *Saxbe,* 501 F.2d 571, 575 (2d Cir. 1974).

[15] A Plea Questionnaire/Waiver of Rights form subsequently entered into the record through Respondent's testimony reflects that the Respondent only pleaded guilty to the manufacturing of THC, rather than the statutory elements relating to delivery/distribution. Resp't Ex. 3 at 3; see also Tr. at 21–22, 67–70. Accordingly, the disposition of this charge is referenced hereinafter as a felony conviction for controlled substance manufacturing.

[16] The Respondent initially marked individual pages of the state court sentencing transcript as separate proposed exhibits, but the entire transcript was relatively brief and was received into evidence as a single exhibit.

[17] Resp't Ex. 1 at 23.

[18] Tr. at 90.

[19] 21 U.S.C. 824(a)(2).

[20] The Government did not produce live testimony from any of the state law enforcement officers.

[21] Gov't Ex. 7 at 1–5.

[22] *Id.* at 13–14.

test report [23] and documents that appear to reflect an inventory of items seized from the Respondent's residence on the night the search warrant was executed; [24] (4) documents purportedly seized from the Respondent's residence; [25] and (5) unsigned, handwritten notes that may have been prepared by law enforcement personnel on the scene of the search warrant executed at the Respondent's home.[26]

Regarding the fifth category (handwritten police notes), the documents are intermittently legible, insufficiently explained by any witness with personal knowledge, were excluded from consideration at the hearing,[27] and will play no role in the disposition of this case.

The documents offered by the Government in the fourth category (seized from the Respondent's residence) were authenticated by the Respondent, himself, who testified that he prepared the handwritten notes in the packet related to preparing for and monitoring the progress of his marijuana grow. Tr. at 50. Some of the seized notes related to information the Respondent accumulated to help him select the most effective lighting to maximize his marijuana yield. *Id.* at 49–50; Gov't Ex. 7 at 32. There are other notes that the Respondent indicated were taken from a book he read regarding marijuana grow methods,[28] and still more notes reflected his careful monitoring of the growth progress of his marijuana plants. Tr. at 49–51; Gov't Ex. 7 at 35–36. The Respondent identified a portion of the documents as an Internet recipe for preparing ''hash,'' an enterprise that he apparently attempted in vain. Tr. at 52; Gov't Ex. 7 at 37–41. The Respondent's marijuana research notes and materials were sufficiently authenticated and relevant to merit admission and consideration in these proceedings and clearly demonstrate a high level of planning in his efforts to circumvent the CSA.

Regarding the other documents in Government Exhibit 7, the first three *J.A.M. Builders* factors militate in favor of admission. There is no indication of bias on the part of the local law enforcement officers who swore out the warrant affidavits, prepared the investigative reports, and took the sworn statements from the two boyfriends. Likewise, no bias is readily apparent regarding the statements from the boyfriends.[29] The Respondent clearly had the opportunity to subpoena [30] any of the authors of any of the documents but elected (presumably for tactical reasons) not to do so. The documents are internally consistent and essentially consistent with one another.

Consideration of the fourth factor, that is, whether the information has been recognized by the courts as inherently reliable, is something of a mixed bag regarding Government Exhibit 7. In this administrative setting, the inventory log is reliable to the same extent generally accorded to records prepared in the regular course of business,[31] and courts routinely rely on sworn affidavits to support searches, seizures, and other intrusions,[32] but there is no precedential basis to accord any special weight to police reports. In *Richardson,*[33] the Supreme Court squarely based its holding on the narrow fact that the party opposing admission never used the available procedural devices to seek the personal appearances of the declarants, but the *Richardson* court took pains to point out that the case dealt with the admission of medical reports, each of which was ''prepared by a practicing physician who had examined [the opponent of admission and where each of whom had] set[] forth his medical findings in his area of competence. * * *'' 402 U.S. 389, 402 (1971). As the post-*Richardson* cases have evolved, the emphasis has increasingly focused on whether the opponent could have subpoenaed the declarant but declined to do so, and whether the hearsay is reliable and trustworthy. In *U.S. Pipe & Foundry Co.* v. *Webb,* 595 F.2d 264, 270 (5th Cir. 1979), the court re-emphasized that medical reports are inherently reliable and trustworthy. In *Klinestiver* v. *DEA,* 606 F.2d 1128, 1130 (D.C. Cir. 1979), the court held that hearsay at a DEA administrative hearing may constitute substantial evidence where the opponent of the evidence could have subpoenaed the declarant but declined to do so, and that the controlling guidance regarding admission is found in the DEA regulations. The current DEA regulations provide for the admission of evidence that is ''competent, relevant, material, and not unduly repetitious.'' 21 CFR 1316.59(a).

Balancing the *J.A.M. Builders* factors, the sworn statements, police reports, and allied paperwork (excluding the withdrawn, illegible handwritten notes) were admitted and considered, albeit with the heightened scrutiny correctly attached to evidence that has not been exposed to the rigors of cross-examination. *Cf.* 21 CFR 1301.43(c) (DEA regulations provide for the consideration of waiver-related statements to be ''considered in light of the lack of opportunity for cross-examination in determining the weight to be attached to matters of fact asserted therein.''). Government Exhibit 7, as admitted, establishes that the search warrant and ultimate arrest was the result of an investigation initiated based on information gleaned from a former boyfriend of the Respondent's niece. The niece was living in the Respondent's home and apparently smoking and sharing marijuana with guests, including (by their own accounts and at different times) the two boyfriends. When officers executed the state-authorized [34] search warrant, they uncovered a hidden, locked room with elaborate equipment utilized for the growing of marijuana, as well as multiple bags and other containers that held marijuana plant parts and seeds. According to the paperwork, 4.76 pounds [35] of marijuana were identified, tested,[36] and seized from the Respondent's residence. Gov't Ex. 7 at 17–18. Additionally, the executing officers seized some paperwork they believed to be related to the growing of marijuana, and through a previous, separate authorization, learned that the Respondent's power bill, at least in the opinion of the state investigators, was

[23] Although at least part of the Respondent's objection to the field test portion of the exhibit was founded in counsel's assertion that the type of field test employed was not adequately identified, Tr. at 30, the police paperwork indicates that a Nark II test 05 was utilized. Gov't Ex. 7 at 15.

[24] *Id.* at 6–12, 15–31.

[25] *Id.* at 32–41.

[26] *Id.* at 44–46.

[27] Tr. at 38–39.

[28] Gov't Ex. 7 at 33–34.

[29] To the extent that bias borne of jealousy or unrequited affection may have existed, it was not developed, elicited, or argued by any party to this litigation. To assign bias on the current record would be to engage in unwarranted and unfair speculation.

[30] In fact, the Prehearing Ruling, which was issued after service of the Government's Prehearing statement outlining its evidence, set a date by which subpoena requests were due. ALJ Ex. 7 at 4. No subpoena requests from the Respondent were filed.

[31] This heightened level of reliability is based on the likelihood that inventory logs reflecting seized property have been accurately kept, given that such logs are judicially-mandated pursuant to Fed. R. Crim. P. 41(f)(1)(b) (or, as is relevant to this case, the equivalent Wisconsin state criminal procedural rule, i.e. Wisc. Stat. § 968.17) and routinely relied on for a property itemization and accounting purpose by the courts, law enforcement, and the person whose property was seized.

[32] *See* Fed. R. Crim. P. 41(d).

[33] 402 U.S. 389 (1971).

[34] The search warrant was authorized by a Langlade County Court Commissioner. Gov't Ex. 7 at 2–3.

[35] DI Hill testified that 1,725 grams were seized, Tr. at 16, which would be a little less than four pounds.

[36] Gov't Ex. 7 at 15.

unusually large.[37] *Id.* at 1. The officers observed and seized what they characterized as ''four large stalks [of marijuana] in the hydroponic growing stages.'' [38] *Id.* at 9.

Inasmuch as DI Hill gleaned all the information he had about the case from documents that he obtained from local law enforcement officers and a court database check, the factual aspects of the case depend less on the credibility of his testimony than the truth of the facts established by the Government's exhibits introduced through Hill's testimonial foundations. Furthermore, even considering that the acknowledgement of virtually all the factual matters asserted in the paperwork by the Respondent in his testimony further diminishes the significance of Hill's testimony, it is worth noting that DI Hill provided testimony that was sufficiently detailed, plausible, and internally consistent to be deemed credible.

The Respondent testified at the hearing.[39] By his own account, the Respondent, who lives with his wife, two small children,[40] and his niece, has quite a history with marijuana. He recalled smoking marijuana most days he attended college, most non-working days after college, and several times a week through his medical residency program. Tr. at 44–45. After presumably purchasing marijuana on a regular basis for most of his adult life, the Respondent testified that he began growing his own marijuana during the 2004–2005 time frame. *Id.* at 46. At the time his house was searched, his current marijuana crop (grow) had four (4) plants, the yield of which, at least according to his testimony, was reserved for use by himself and his wife. *Id.* at 47. The Respondent acknowledged that he and his wife share their family home with their two children, ages nine and eleven, as well as a niece, and that his in-laws were the only people outside his home who knew about his foray into the world of marijuana production. *Id.* at 47. While the Respondent did not dispute the accounts in the police paperwork that ascribe significant marijuana consumption to his niece, he testified that this information came as a surprise to him. *Id.* at 47–48.

Regarding his conviction, the Respondent freely acknowledged all the attendant facts raised in the court records and the police paperwork, as well as the illegality of his conduct and the propriety of the conviction. *Id.* at 55, 77, 79. The Respondent represented that he intended to avoid violating controlled substance laws in the future. *Id.* at 76. In response to questioning by the Government, the Respondent agreed that marijuana is an illegal substance and concurred that his conviction was not unfair. *Id.* at 55. When asked why he elected to grow marijuana (after an adult lifetime of presumably acquiring the substance by other means), the Respondent related that he lived in a small community and would likely be easily identified as a physician during any exploit to purchase marijuana from those ''on the street'' in his local area willing to sell it.[41] *Id.* at 78.

The Respondent credibly testified that he has complied with the conditions fixed by the Wisconsin Medical Board during the first three years of the five-year duration of its Order. *Id.* at 58–59. In particular, the Respondent testified that he has complied with the Order's mandate of random urinalysis, including one directive to provide a random sample which serendipitously arose while he was traveling to the hearing of this case. *Id.* at 59.

The Respondent also elaborated on the community service that he provided at the direction of the Wisconsin Medical Board. Although he performed work at a hospice as directed by the criminal court, the Respondent also indicated that he continues to contribute his time to the nun-operated hospice, even after the community service time in his sentence has been completed. *Id.* at 64–65. The Respondent also testified that he had performed volunteer work at the hospice before his conviction. *Id.*

The Respondent characterized his community as ''sparsely populated,'' discussed his perception that physician recruitment was problematic in the area, and indicated that he would be unable to provide his emergency room services if rendered unauthorized to handle controlled substances. *Id.* at 65–66.

While the Respondent implausibly testified that the marijuana he produced was only consumed by himself and his wife, and that he was surprised to learn that his niece (who was also the legal ward of his wife) was also smoking his pot by herself and with company, the bulk of his other testimony, though admittedly self-serving, was sufficiently plausible, detailed, and internally consistent to be deemed generally credible for purposes of this recommended decision.

The Respondent offered letters of support from various medical practitioners in his community. Resp't Exs. 8–11. A carefully-worded letter authored by Noel N. Deep, M.D., F.A.C.P., the Chief of Staff at the Langlade Hospital, relates that the Respondent has ''scored high on patient satisfaction surveys, that his ''professionalism and clinical skills'' have won praise from members of the hospital staff, that he has volunteered to serve in numerous capacities in the hospital, and that Dr. Deep has ''never been aware of any adverse clinical outcomes or patient care concerns'' related to the Respondent's work. Resp't Ex. 8. The principal thrust of Dr. Deep's letter is to essentially highlight the potential impact that would be felt by Langlade Hospital and the rural community surrounding it should one of its four emergency room physicians be deprived access to controlled substance handling authority by DEA. *Id.* In particular, the letter indicates that an adverse DEA decision in this regard ''would burden the other three physicians who currently share the Emergency Room call rotation with [the Respondent].'' *Id.*

Another Langlade Hospital administrator, David Schneider, the executive director, also provided a letter of support. Resp't Ex. 10. Like the wording in Dr. Deep's letter, this hospital official references the Respondent's patient satisfaction survey scores, and indicates that there have been ''[n]o clinical adverse issues'' associated with the Respondent's practice at the hospital, which (like the survey results) Mr. Schneider characterizes as ''at the upper end of quality scales.'' *Id.* Mr. Schneider, like Dr. Deep, spends a significant portion of his letter seeking leniency for the Respondent, based upon community

[37] Presumably this information was included on the affidavit in support of the search warrant under the theory that it was consistent with the power required to run electrical equipment associated with a marijuana grow operation.

[38] Although the police paperwork indicates that both still and video photographs of the hidden room, marijuana, and paraphernalia were generated at the scene contemporaneous with the search warrant execution, the Government, inexplicably, did not offer any of this evidence at the hearing. During his testimony, DI Hill initially testified that three (3) marijuana plants were seized from the Respondent's residence. Tr. at 39–40. This is curious in light of the fact that he readily maintained that all his knowledge about the case was obtained through the paperwork he provided, *Id.* at 19, 41, and the paperwork indicates that four (4) plants were seized. Gov't Ex. 7 at 9. In his testimony, the Respondent confirmed that four (4) plants were seized. Tr. at 46.

[39] Although the Respondent noticed himself as a witness, he testified as a witness called by the Government.

[40] Tr. at 56.

[41] During his criminal sentencing hearing, the Respondent's counsel argued that he chose to grow marijuana to help his wife with a digestive disorder and as a way to withhold support from Mexican drug cartels. Resp't Ex. 1 at 19. The Respondent's response at his DEA administrative hearing appears to be a more candid and plausible handling of the issue.

impact, stating that ''Langlade Hospital serves a medically underserved area [where] it has been and is increasingly difficult to obtain and maintain skilled practitioners in full-time [emergency room] service.'' *Id.*

A third letter admitted into evidence is co-signed by the three emergency medicine physicians who, according to the Respondent,[42] are his partners at Northwoods Emergency Physicians, LLP (the Northwoods Group), a medical entity that provides emergency room physicians to Langlade Hospital. Resp't Ex. 9; Tr. at 63. The letter from the Respondent's associates details the conditions fixed by the Wisconsin Medical Board in its Order, and (somewhat self-servingly) concludes that ''[t]hese are adequate measures to assure patient safety.'' Resp't Ex. 9. Like the other letters, there is a reference to the doctors' perception that the area surrounding Langlade Hospital is ''underserved'' and currently benefits by the Respondent's presence there, and presumably also his access to controlled substances.

The Respondent also provided a letter from Sister Dolores Demulling, R.N., M.S., the Administrator at the LeRoyer Hospice affiliated with the hospital where the Respondent serves in the emergency room. Resp. Ex. 11. Sr. Demulling confirmed the Respondent's representations that he has volunteered his time doing hospice work and provides her estimation that the Respondent's ''medical care in the emergency room has always been very satisfactory.'' *Id.*

In evaluating the weight to be attached to the representations in the letters provided by the Respondent's hospital administrators and peers, it can hardly escape notice that, in addition to the fact that the authors were not subjected to the rigors of cross examination, each source has a significant influencing consideration that bears caution. The emergency room doctors are the Respondent's partners. As partner-members to a group which is contracted to cover Langlade Hospital, it is not improbable that the doctors would likely be understandably reluctant to question the abilities of one of their own. Criticism of a member's ability to safely continue to serve the hospital would perforce call into question the Northwoods Group's ability to continue to staff the emergency room. Similarly, the hospital administrators who have elected to allow the Northwoods Group to continue to utilize the Respondent's services for patient care would be virtually unable to provide an unflattering assessment of any concerns they possess without exposing the institution to significant potential past and future tort and/or regulatory liability. However, even bearing these concerns in mind, the letters can, should, and will nevertheless provide evidence that other medical professionals and administrators feel sufficiently confident in the Respondent and his level of professional commitment that they believe his continued authorization to handle controlled substances will not pose an unacceptable risk to the patients served by Langlade Hospital.

Other evidence required for a disposition of this issue is set forth in the analysis portion of this decision.

The Analysis

The Deputy Administrator[43] may revoke a registrant's DEA Certification upon a finding that the registrant has been convicted of a felony relating to a CSA-designated controlled substance. 21 U.S.C. § 824(a)(2). As discussed *supra,* a conviction resulting from a *nolo contendere,* or ''no contest'' plea, is a conviction providing a sufficient basis for the revocation of a DEA COR under section 824(a)(2). *Pearce* v. *DEA,* 867 F.2d 253, 255 (6th Cir. 1988); *Noell* v. *Bensinger,* 586 F.2d 554, 556–57 (5th Cir. 1978); *Sokoloff* v. *Saxbe,* 501 F.2d 571, 574–75 (2d Cir. 1974); *Edson W. Redard, M.D.,* 65 FR 30616, 30618 (2000). Furthermore, inasmuch as the Agency has consistently held that a deferred adjudication of guilt following a guilty plea, even where the proceedings are later dismissed, still constitutes a conviction within the statutory meaning of the CSA,[44] the potential for some future reduction of the Respondent's conviction before the Wisconsin state courts bears little on any issue relevant to a disposition of this administrative case. Hence, inasmuch as the uncontroverted evidence of record conclusively establishes that the Respondent has been convicted of a state felony relating to controlled substances, *to wit,* the manufacture of a Schedule I controlled substance (marijuana), the Government has established a basis under which the revocation relief it seeks may be evaluated to determine whether it constitutes a provident exercise of discretion. *Pearce,* 867 F.2d at 256.

In addition to the controlled-substance-related felony conviction basis that the Government established in support of the revocation it seeks, under 21 U.S.C. 824(a)(4), the Deputy Administrator may also revoke a registrant's DEA COR if persuaded that the registrant ''has committed such acts that would render * * * registration under section 823 * * * inconsistent with the public interest * * *'' The following factors have been provided by Congress 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 and safety.

21 U.S.C. 823(f).

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Deputy Administrator may properly give each factor whatever weight she deems appropriate in determining whether an application for a registration should be denied. *Id.; David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993); *see also Joy's Ideas,* 70 FR 33195, 33197 (2005); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16422 (1989). Moreover, the Deputy Administrator is ''not required to make findings as to all of the factors * * *.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005). The Deputy Administrator is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick* v. *DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors and remand is required only when it is unclear whether the relevant factors were

[42] Tr. at 73.

[43] This authority has been delegated pursuant to 28 CFR 0.100(b) and 0.104.

[44] *Vincent J. Scolaro, D.O.,* 67 FR 42060, 42065 (2002) (citing *Yu-To Hsu, M.D.,* 62 FR 12840 (1997)); *Redard,* 65 FR at 30618; *Stanley Alan Azen, M.D.,* 61 FR 57893, 57895 (1996). Agency precedent has previously validated the position that to hold otherwise would mean ''the conviction could only be considered between its date and the date of subsequent dismissal * * * [which would be] inconsistent with holdings in other show cause cases that the passage of time since misconduct affects only the weight to be given the evidence.'' *Edson W. Redard, M.D.,* 65 FR 30616, 30618 (2000) (citing *Mark Binette, M.D.,* 64 FR 42977, 42980 (1999)); *Thomas H. McCarthy, D.O.,* 54 FR 20938 (1989), *aff'd* No. 89–3496 (6th Cir. Apr. 5, 1990).

considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest * * * .'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009).

In an action to revoke a registrant's DEA Certificate of Registration, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 CFR 1301.44(e). Once DEA has made its prima facie case for revocation of the registrant's DEA COR, the burden of production then shifts to the Respondent to show that, given the totality of the facts and circumstances in the record, revoking the registrant's registration would not be appropriate. *Morall,* 412 F.3d at 174; *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *U.S. Dept. of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 FR 72311, 72311 (1980). Further, ''to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010).

Where the Government has sustained its burden and established that a registrant has committed acts inconsistent with the public interest, that registrant must present sufficient mitigating evidence to assure the Deputy Administrator that he or she can be entrusted with the responsibility commensurate with such a registration. *Steven M. Abbadessa, D.O.,* 74 FR 10077 (2009); *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008); *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007). Normal hardships to the practitioner, and even the surrounding community, that are attendant upon the lack of registration are not a relevant consideration. *Abbadessa,* 74 FR at 10078; *see also Gregory D. Owens, D.D.S.,* 74 FR 36751, 36757 (2009).

The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct. *Hoxie,* 419 F.3d at 483; *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Abbadessa,* 74 FR at 10078; *Krishna-Iyer,* 74 FR at 463; *Medicine Shoppe,* 73 FR at 387.

While the burden of proof at this administrative hearing is a preponderance-of-the-evidence standard, *see Steadman* v. *SEC,* 450 U.S. 91, 100–01 (1981), the Deputy Administrator's factual findings will be sustained on review to the extent they are supported by ''substantial evidence.'' *Hoxie,* 419 F.3d at 481. While ''the possibility of drawing two inconsistent conclusions from the evidence'' does not limit the Deputy Administrator's ability to find facts on either side of the contested issues in the case, *Shatz,* 873 F.2d at 1092; *Trawick,* 861 F.2d at 77, all ''important aspect[s] of the problem,'' such as a respondent's defense or explanation that runs counter to the Government's evidence, must be considered. *Wedgewood Village Pharm.* v. *DEA,* 509 F.3d 541, 549 (D.C. Cir. 2007); *Humphreys,* 96 F.3d at 663. The ultimate disposition of the case must be in accordance with the weight of the evidence, not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *Steadman,* 450 U.S. at 99 (internal quotation marks omitted).

Regarding the exercise of discretionary authority, the courts have recognized that gross deviations from past agency precedent must be adequately supported, *Morall,* 412 F.3d at 183, but mere unevenness in application does not, standing alone, render a particular discretionary action unwarranted. *Chein* v. *DEA,* 533 F.3d 828, 835 (D.C. Cir. 2008) (citing *Butz* v. *Glover Livestock Comm. Co., Inc.,* 411 U.S. 182, 188 (1973)), *cert. denied,* __ U.S. __, 129 S. Ct. 1033 (2009). It is well-settled that since the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in this recommended decision are entitled to significant deference, *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 496 (1951), and that this recommended decision constitutes an important part of the record that must be considered in the Deputy Administrator's decision, *Morall,* 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are by no means binding on the Deputy Administrator and do not limit the exercise of that discretion. 5 U.S.C. § 557(b); *River Forest Pharm., Inc.* v. *DEA,* 501 F.2d 1202, 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* 8 (1947).

Factor 1: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority

The present record reflects that the Wisconsin Medical Board, by issuing a suspension that was stayed with conditions, implicitly determined that with the imposition of a number of arguably arduous monitoring and supervision conditions the Respondent could continue to practice medicine and handle controlled substances. Gov't Ex. 3; Resp't Ex. 7.

Action taken by a state medical board is an important, though not dispositive, factor in determining whether the continuation of a DEA COR is consistent with the public interest. *Patrick W. Stodola, M.D.,* 74 FR 20727, 20730 (2009); *Jayam Krishna-Iyer,* 74 FR at 461. The considerations employed by, and the public responsibilities of, a state medical board in determining whether a practitioner may continue to practice within its borders are not coextensive with those attendant upon the determination that must be made by the DEA relative to continuing a registrant's authority to handle controlled substances. It is well-established Agency precedent that a ''state license is a necessary, but not a sufficient condition for registration.'' *Leslie,* 68 FR at 15230; *John H. Kennedy, M.D.,* 71 FR 35705, 35708 (2006). Even the reinstatement of a state medical license does not affect the DEA's independent responsibility to determine whether a registration is in the public interest. *Mortimer B. Levin, D.O.,* 55 FR 9209, 8210 (1990). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 FR 6580, 6590 (2007), *aff'd, Chein* v. *DEA,* 533 F.3d 828 (D.C. Cir. 2008), *cert. denied,* __ U.S. __, 129 S. Ct. 1033 (2009). Congress vested authority to enforce the CSA in the Attorney General and not state officials. *Stodola,* 74 FR at 20375. On the issue of revocation, consideration of this first factor presents something of a mixed bag. By its own terms, the Order suspends the Respondent's medical license indefinitely, but stays that action, contingent on the satisfaction of numerous conditions. Gov't Ex. 3 at 3; Resp't Ex. 7 at 2. In exercising its public safety responsibilities and medical oversight authority relative to the Respondent, the Order of the Wisconsin Medical Board reflected the judgment of that body that the Respondent's transgressions, while sufficiently grave to warrant a complete preclusion of all medical privileges, were not of a nature

that precluded the safe treatment of patients and handling of controlled substances, so long as significant monitoring and oversight were mandated. This factor weighs in favor of a significant sanction, but also lends some possible support to the consideration of a less stringent alternative to the complete COR revocation sought by the Government.

Factor 3: The Applicant's Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution, or Dispensing of Controlled Substances

The record reflects the Respondent was convicted of felony manufacture of marijuana, as referenced under the 21 U.S.C. 824(a)(2) analysis. Consistent with his plea, the Respondent was also convicted of a state misdemeanor offense related to the possession of drug paraphernalia.

By its own terms, as expressed in the record of conviction, the Respondent's marijuana manufacture felony conviction is clearly related to the manufacture of controlled substances. That the Respondent was convicted of illegally manufacturing a Schedule I controlled substance in a clandestine partition within the bedroom closet of his residence while he was operating under a DEA COR is, without a doubt, logically repugnant to the notion that he should ever again be entrusted with the responsibilities of a DEA registrant, and therefore militates strongly in favor of the revocation sought by the Government.

As clear as the pendulum under Factor 3 swings regarding the Respondent's manufacturing conviction, the picture is somewhat murkier regarding his misdemeanor conviction for drug paraphernalia. While the paraphernalia conviction undoubtedly relates to controlled substances, Agency precedent is less clear on whether such a conviction relates to the manufacture, distribution, or dispensing of controlled substances under the third public interest factor. For example, with respect to convictions involving possession of actual narcotics, in *Stanley Alan Azen, M.D.,* 61 FR 57893, 57895 (1996), *aff'd, Azen* v. *DEA,* 76 F.3d 384 (9th Cir. 1996), a state felony conviction for possession of cocaine was held to be relevant to Factor 3. Likewise, in *Jeffrey Martin Ford, D.D.S.,* 68 FR 10750, 10753 (2003), a cocaine possession felony conviction was held to implicate this factor. On the contrary, in *Super-Rite Drugs,* 56 FR 46014 (1991), the Agency determined that a cocaine possession conviction did not implicate Factor 3 based on the reasoning that ''[a]lthough [the respondent] entered a guilty plea to a drug-related felony, *his actions did not relate to the manufacture, distribution, or dispensing* of controlled substances.'' *Id.* (emphasis supplied). Ironically, although *Super-Rite Drugs* is the more dated precedent, it is the most persuasive and should be followed. The analysis in *Azen* centered on the subsequent state court reversal of the conviction, and in *Ford,* the decision actually omitted the phrase ''relating to the manufacture, distribution, or dispensing'' when addressing the issue. A contrary interpretation would eviscerate the difference between public interest Factors 3 and 5 and ignore the specific language inserted by Congress. Guidance can be found in the accepted maxims of statutory interpretation that ''a statute of specific intention takes precedence over one of general intention,'' *United States* v. *Dozier,* 555 F.3d 1136, 1140 n.7 (10th Cir. 2009) (citing *NISH* v. *Rumsfeld,* 348 F.3d 1263, 1272 (10th Cir. 2003)), that ''words should ordinarily be given their ordinary meaning,'' *Moskal* v. *United States,* 498 U.S. 103, 108 (1990), and that ''where language is clear and unambiguous, it must be followed, except in the most extraordinary situation where the language leads to an absurd result contrary to clear legislative intent.'' *United States* v. *Plots,* 347 F.3d 873, 876 (10th Cir. 2003) (citing *United States.* v. *Tagore,* 158 F.3d 1124, 1128 (10th Cir. 1998)); s*ee Griffin* v. *Oceanic Contractors,* 458 U.S. 564, 572 (1982); *Comm'r* v. *Brown,* 380 U.S. 563, 571 (1965). The ordinary meaning of the clear, unambiguous, specifically limiting words ''relating to the manufacture, distribution, or dispensing of controlled substances'' set forth in 21 U.S.C. 823(f) compels the result that a conviction that is related to illegal drugs generally, but not to manufacturing, distributing, or dispensing specifically, is not relevant to public interest Factor 3.

In evaluating the Respondent's paraphernalia conviction within this analytical framework, even assuming, *arguendo,* that a possession of drug paraphernalia conviction stemming from items *used* to manufacture a controlled substance could conceivably fall within a broad reading of the conduct contemplated under Factor 3, the record in the instant case, as it stands, does not provide a sufficient basis to make such a finding. The lack of factual development and associated evidence presented at the hearing concerning details regarding the specific items of alleged drug paraphernalia upon which the conviction was premised (and the purpose for which said items were utilized, i.e. for personal use, manufacture, distribution, etc.) simply does not provide a means to determine whether the conviction relates to the manufacture, distribution, or dispensing of controlled substances as contemplated under the statutory language employed under Factor 3 and as interpreted by Agency precedent.

Accordingly, although an analysis of the Respondent's two convictions present some mixed considerations regarding Factor 3, the gravity and circumstances of the manufacturing felony conviction so profoundly tip the scales against the Respondent's continued registration that consideration of this factor weighs strongly in favor of revocation.

Factors 2 and 4: The Respondent's Experience in Dispensing Controlled Substances and Compliance With Applicable State, Federal or Local Laws Relating to Controlled Substances

The evidence of record in this case raises issues regarding both Factor 2 (experience dispensing[45] controlled substances) and Factor 4 (compliance with federal and state law relating to controlled substances). Regarding Factor 2, neither party to the litigation introduced any evidence relevant to the quality of the controlled substance dispensing that the Respondent has engaged in relative to his medical practice.[46] Ordinarily, the qualitative manner and the quantitative volume in which a registrant has engaged in the dispensing of controlled substances, and how long he has been in the business of doing so are factors to be evaluated in reaching a determination as to whether he should be entrusted with a DEA certificate. In some cases, viewing a registrant's actions against a backdrop of how he has performed activity within the scope of the certificate can provide a contextual lens to assist in a fair adjudication of whether continued registration is in the public interest. However, the Agency has taken the reasonable position that although evidence that a practitioner may have conducted a significant level of sustained activity within the scope of the registration for a sustained period is a relevant and correct consideration, this factor can be outweighed by acts

[45] The statutory definition of the term ''dispense'' includes the prescribing and administering of controlled substances. 21 U.S.C. 802(10).

[46] The record does reflect that the controlled substance prescription monitoring condition imposed on the Respondent by the Wisconsin Medical Board has yielded no negative feedback as of April 9, 2010. *See* Resp't Ex. 9.

held to be inconsistent with the public interest. *Jayam Krishna-Iyer,* 74 FR at 463.

While true that the record is devoid of evidence related to the Respondent's prescribing practices at work, at home he was producing a significant amount of marijuana, a Schedule I controlled substance, and distributing it (at a minimum) to himself and his wife. Tr. at 47; Resp't Ex. 1 at 26. The record also contains significant evidence that, even if the Respondent's dubious testimony that he was surprised that his niece was using marijuana is credited, it is clear that any safeguards deployed to ensure against that eventuality were sadly lacking. Virtually the only evidence of any dispensing of controlled substance on the part of the Respondent is that he dispensed marijuana to himself and his wife, and in the process lacked the ability and/or inclination to keep the drug from his niece and her friends. Thus, consideration of the Respondent's dispensing history, at least as it relates to his marijuana harvest, militates in favor of revocation.[47]

Regarding Factor 4, to effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales* v. *Raich,* 545 U.S. 1, 13 (2005). Every DEA registrant serves as a guardian of the closed regulatory system, with specific obligations aimed at protecting against improper diversion. It would be difficult to imagine a more deliberate, flagrant disregard to the Respondent's obligations as a registrant than his decision to convert a portion of his residence into a marijuana factory for himself and his family. While there is no doubt that there was room for some elaboration of the evidence on the part of the Government, the record clearly demonstrates that this was not a single marijuana plant growing in a tiny pot on the Respondent's bedroom window. The Respondent pled guilty to a felony-level conviction for the manufacture of a Schedule I controlled substance, which was conducted in a specially-constructed secret room, with sophisticated equipment, detailed instructions, and documented monitoring. Gov't Ex. 7. Consideration of the Respondent's compliance with state and federal laws related to controlled substances (Factor 4) militates strongly in favor of revocation.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

Under Factor 5, the Deputy Administrator is authorized to consider ''other conduct which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5). It is settled Agency precedent that, ''offenses or wrongful acts committed by a registrant outside of his professional practice, but which relate to controlled substances may constitute sufficient grounds for the revocation of a registrant's DEA Certificate of Registration.'' *David E. Trawick, D.D.S.,* 53 FR 5326 (1988); *Jose Antonio Pla-Cisneros, M.D.,* 52 FR 42154 (1987); *Walker L. Whaley, M.D.,* 51 FR 15556 (1986). As discussed above, the Respondent produced a significant yield of a Schedule I controlled substance and distributed it to himself and (at least) his wife. While any action that undermines the closed regulatory system by the intentional and secretive production of a controlled substance arguably has the potential to adversely impact public safety in a broad sense, the issue under Factor 5 is not merely whether the public safety was adversely impacted to any extent, but rather, whether consideration of any threat to public safety militates in favor of revocation. In other words, consideration of evidence under Factor 5 is less of a litmus test for conceivable public impact than it is a question of degree. The credible, unrefuted evidence of record establishes that the fruits of the Respondent's marijuana grow were being abused by not only himself and his wife, but also by his niece and at least two of her suitors. Gov't Ex. 7 at 13–14. Admittedly, no admissible evidence established the age of the Respondent's niece,[48] and no evidence indicated that the Respondent's minor children were exposed to the illegal fruits of his grow, but it is beyond dispute that the marijuana he was growing was being regularly and continuously abused by persons other than the Respondent. The Respondent grew marijuana plants, abused marijuana himself, and shared it with his wife and niece. His niece shared it with others. However, although the public safety was arguably affected, the issue here is not so narrow. Even acknowledging the reality that any leak in the closed system of controlled substances cannot occur without some diminishment of the public safety in general, a consideration of this Factor (public health and safety threat), under these circumstances, does not support the revocation sought by the Government.

Recommendation

A balancing of the public interest factors militates sufficiently in favor of revocation to compel the conclusion that the Government has borne its burden to establish a *prima facie* case for revocation under 21 U.S.C. 824(a)(4) as well as (a)(2). Inasmuch as the Government has made out a *prima facie* case for revocation, to avoid this sanction, the burden shifts to the Respondent to demonstrate that COR revocation is inappropriate. *Morall,* 412 F.3d at 174; *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *U.S. Dept. of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 FR 72311 (1980). Further, to meet this burden ''to rebut the Government's *prima facie* case, [the Respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR 8194, 8236 (2010).

The Respondent credibly testified that he is complying with the conditions of his criminal sentence, including the terms of his probation, and that he is complying with the monitoring terms fixed by the Order of the Wisconsin Medical Board, including mandated substance abuse treatment[49] and a regimen of random drug tests that have thus far yielded no adverse results. Tr. at 58–59. The Respondent testified that he accepts the wrongfulness of his conduct and that he has resolved not to violate drug laws in the future. *Id.* at 77–79.

While the Respondent, with the words of acceptance he carefully employed in his testimony, has satisfied the Agency-created condition precedent to seek amelioration of the sanction of revocation, his words of acceptance are at least somewhat fortified by his

[47] Although the record contains evidence that a .38 caliber handgun was located near the entrance to the secret room that contained the Respondent's marijuana grow and associated equipment, and that marijuana was found in many small paper and plastic bags and other containers with other bags readily accessible, the evidence was not developed sufficiently to allow any relevant inference (such as an escalated likelihood that these types of items are often linked with distribution activity) from those factors. Gov't Ex. 7 at 9, 17, 19, 23–31. Accordingly, no such inference can fairly be drawn on this record.

[48] According to the police reports, the Respondent's spouse indicated that she is the legal guardian of the Respondent's niece. Gov't Ex. 7 at 20.

[49] However, the Respondent introduced no input from anyone connected with any drug rehabilitation program in which he has participated.

apparent level of uneventful compliance with a significant level of restrictions and monitoring. Still, his actions regarding his in-home marijuana factory, at least as they are depicted in the record evidence, are remarkable in the extent to which they reflect a high level of planning and deliberation to thwart the CSA. This was not an accidental occurrence or a brief dalliance, but an elaborate, secretive, deliberate, liberally-financed plan to undermine the CSA—the Act that authorizes the COR that was issued to the Respondent as a registrant. This is the same COR upon which, according to his testimony, he bases his livelihood as a physician. Tr. at 65. Under the circumstances presented here, the Agency has an interest in both assuring that the Respondent can be entrusted with the responsibilities attendant upon a COR registrant and (notwithstanding the non-punitive nature of these proceedings) the Agency's legitimate interest in deterring others from similar acts. *Hassman,* 75 FR at 10094; *Joseph Gaudio, M.D.,* 74 FR 10083, 10095 (2009); *Southwood Pharms., Inc.,* 72 F.R at 36504 (citing *Butz* v. *Glover Livestock Commission Co., Inc.,* 411 U.S. 182, 187–88 (1973)). Therefore, the appropriate sanction must factor in the Respondent's acknowledgement of wrongdoing and efforts at demonstrating sufficient contrition and rehabilitation efforts, while also incorporating the Agency's interests in the integrity of the closed system and deterrence of like conduct.

The Government, in its Proposed Findings of Fact and Conclusions of Law (Government Closing Brief), maintains that the nature of the marijuana activity as well as what it perceives as a lack of remorse, supports revocation. Gov't Closing. Br. at 4. As discussed, *supra,* the Respondent expressed an acknowledgement of wrongdoing at the hearing. Tr. at 77–79. Thus, the Government's argument in this regard is essentially that the Respondent has not said sufficiently that he regrets his actions, i.e., he is not sorry *enough.* While, admittedly, the tenor of the Respondent's testimony at the hearing did not reflect a high level of contrition, he did demonstrate an acknowledgement that his actions were illegal and that the punishments meted out by the criminal justice system were not unfair. Similarly, his thus-far unblemished compliance with conditions imposed by the Wisconsin Medical Board and the criminal court sentence demonstrates at least some level of commitment to rehabilitation. Even so, true remorse, to the extent that Respondent may possess it, was not patently evident from his presentation at the hearing. During his testimony, the Respondent gave the distinct impression that he was not so much sorry about his transgressions as he was sorry that he got caught and was laboring under the criminal and administrative consequences of that reality.

In support of its argument that Agency precedent calls for revocation, in its Closing Brief, the Government cites three cases, all of which are distinguishable from the present case. In *Arthur C. Rosenblatt, M.D.,* 55 FR 25901 (1990) and *Robert G. Crummie, M.D.,* 55 FR 5303 (1990), the Agency determined that the respondents not only grew marijuana, but also had significant controlled substance prescribing anomalies. The revocation issued in *Alan L. Ager, D.P.M.,* 63 FR 54732 (1998) was the result of sustained allegations that the respondent, less than a year and a half after being convicted of growing 1,719 marijuana plants, was caught (and ultimately convicted) of growing 135 more marijuana plants. *Id.* Not only was the respondent in *Ager* a recidivist who obviously learned nothing from his first conviction, but he produced marijuana in quantities far in excess of the established levels in this case.[50]

The cases cited in the Government's Closing Brief are distinguishable on other grounds as well, apart from the disparities in marijuana production scale and illegal prescribing practices. The respondent in *Crummie* untruthfully testified that he never used, possessed, or manufactured marijuana, and he never accepted responsibility or remorse for his misconduct. 55 FR at 5304. Relatedly, the respondent in *Ager* failed to offer an explanation for his misconduct, to accept responsibility or remorse, or to provide assurances he would no longer illegally manufacture marijuana in the future. 63 FR 54733. Unlike the cited cases, the Respondent in the instant case, despite his lukewarm remorse, explained the reasons for his illegal misconduct and at least articulated his assurance that he would never manufacture marijuana again.

The Government also cites in its closing brief *Gordon M. Acker, D.M.D.,* 52 FR 9962 (1987) for the proposition that DEA possesses the authority to revoke a registration for a registrant's felony conviction involving controlled substances, even if the respondent did not use his registration in the commission of his felonious actions. While the Government is certainly correct to the extent a felony conviction related to controlled substances is a factor to be considered in deciding whether revocation is appropriate, the facts of each matter are the operative elements which militate in favor of, or against, revocation. In *Acker,* the respondent participated during his dental school years in the largest cocaine organization ever prosecuted in Philadelphia. *Acker,* FR at 9963. The organization profited by millions of dollars per month, and the respondent acted as a redistributor, carrier, and money launderer for the enterprise. *Id.* Here, the Respondent's criminal behavior, while significant, pales in comparison to that of *Acker.* There is no evidence that the Respondent ever sold the marijuana he produced, nor is there evidence that the Respondent was part of a large scale, interstate criminal operation. Accordingly, because the facts of *Acker* and the present case as distinguishable, *Acker* does not compel the same result in this case.

That the cases cited by the Government do not compel the revocation it seeks is not to say that such an outcome would be undeserved or unauthorized. The evidence in this case supports a finding that the Government has established that the Respondent has been convicted of a felony under Wisconsin state law related to a Schedule I controlled substance and that he has also committed acts that are inconsistent with the public interest. Although the nature of the Respondent's controlled substance-related felony conviction and a careful balancing of the statutory public interest factors support the revocation of the Respondent's COR, the determination rendered by the Wisconsin State Medical Board that fastidious monitoring can sufficiently protect its interests in public safety, coupled with the Respondent's satisfactory compliance with the restrictions placed on him by the state criminal courts and the Wisconsin State Medical Board, add sufficient indicia of reliability to his professed acceptance of responsibility to support consideration of a sanction less than outright revocation. Accordingly, although the Government's petition for revocation is not wholly unreasonable under the circumstances, the legitimate interests of the Agency can be attained with the imposition of COR restrictions coupled with a period of suspension for a period no less than six (6) months from the

[50] This was also true in regarding the respondent in the *Crummie* case, who was caught growing fifty marijuana plants. 55 FR at 5304.

date that the Agency issues a final order in this matter.[51]

The Respondent's COR shall be restricted and conditioned in the following manner:

(1) The Respondent will comply with the terms of his criminal sentence and the conditions that are currently in effect, or are subsequently imposed by the criminal sentencing court and/or the Wisconsin Medical Board,[52] and render monthly reports demonstrating such compliance to an official designated by the DEA (designated DEA official) in a manner and format directed by DEA;

(2) The Respondent will provide the DEA designated official with the results of any and all urinalysis and/or toxicology reports related to drug screening tests administered during the period of the suspension and the restricted COR, irrespective of whether such tests have been or are directed by the criminal sentencing court, the Wisconsin Medical Board, and/or any other source, including (but not limited to) tests mandated by liability carriers and/or other regulatory bodies;

(3) The Respondent, at his own expense, will participate in such drug screening tests as may be, from time to time, required by the designated DEA official;

(4) Within a reasonable period, not to exceed thirty (30) days after the issuance of a final Agency decision in this case, the Respondent will execute a document consenting to any and all inspections of the Respondent's home and/or principal place of business conducted by DEA during the period of suspension; and,

(5) Any other reasonable conditions consistent with this decision that may be imposed by the Deputy Administrator in the final Agency decision issued in this case.

Failure to comply with any of the conditions specified above shall be grounds for the further suspension or revocation of the Respondent's registration.

Accordingly, the Respondent's Certificate of Registration should be *suspended* and *restricted* as set forth in this recommended decision.

[51] The Respondent's current COR expires by its own terms on January 31, 2011. In the event that a timely COR renewal application is filed pending final Agency action in this matter in accordance with 21 CFR 1301.36(i) and that application is granted in the final Agency decision, the period of suspension and restricted conditions set forth in this recommended decision may and should be applied to the COR as renewed.

[52] Thus, the conditions fixed by the Order of the Wisconsin Medical Board and the terms of the Respondent's criminal probation are adopted and incorporated herein as conditions of the restricted COR.

Dated: October 4, 2010

John J. Mulrooney, II

U.S. Administrative Law Judge

[FR Doc. 2011–19376 Filed 7–29–11; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–73,420; TA–W–73,420A; TA–W–73,420B]

Alticor, Inc., Including Access Business Group International LLC and Amway Corporation, Buena Park, CA; Alticor, Inc., Including Access Business Group International LLC and Amway Corporation, Including On-Site Leased Workers From Otterbase, Manpower, KForce and Robert Half, Ada, MI; Alticor, Inc., Including Access Business Group International LLC and Amway Corporation, Including On-Site Leased Workers From Helpmates, Lakeview, CA; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended (''Act''), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on April 12, 2010, applicable to workers of Alticor, Inc., including Access Business Group International LLC and Amway Corporation, Buena Park, California. The workers are engaged in activities related to financial and procurement services. The Department's Notice of determination was published in the **Federal Register** on May 20, 2010 (75 FR 28300).

The Notice was amended on April 28, 2010 to include the Ada, Michigan location of the subject firm and on May 24, 2010 to include leased workers on-site at the Ada, Michigan location. The amended Notices were published in the **Federal Register** on May 12, 2010 (75 FR 26794–26795) and June 7, 2010 (75 FR 32221), respectively.

At the request of a State agency, the Department reviewed the certification for workers of the subject firm.

New findings show that the intent of the petitioner was to cover the Buena Park, California, Ada, Michigan, and Lakeview, California locations of the subject firm. The relevant data supplied by the subject firm to the Department during the initial investigation combined the aforementioned locations. Information reveals that workers leased from Helpmates were employed on-site at the Lakeview, California location of the subject firm. The Department has determined that on-site workers from Helpmates were sufficiently under the control of the subject firm to be covered by this certification.

Accordingly, the Department is amending the certification to include workers of the Lakeview, California location of Alticor, Inc., including Access Business Group International LLC and Amway Corporation and including on-site leased workers from Helpmates.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by a shift in financial and procurement services to Costa Rica.

The amended notice applicable to TA–W–73,420, TA–W–73,420A and TA–W–73,420B are hereby issued as follows:

All workers of Alticor, Inc., including Access Business Group International LLC and Amway Corporation, Buena Park, California (TA–W–73,420) and Alticor, Inc., including Access Business Group International LLC and Amway Corporation, including on-site leased workers from Otterbase, Manpower, Kforce and Robert Half, Ada, Michigan, (TA–W–73,420A), and Alticor, Inc., including Access Business Group International LLC and Amway Corporation, including on-site leased workers from Helpmates, Lakeview, California (TA–W–73,420B), who became totally or partially separated from employment on or after February 1, 2009, through April 12, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed in Washington, DC, this 18th day of July 2010.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2011–19343 Filed 7–29–11; 8:45 am]

BILLING CODE 4510–FN–P