Dated: October 6, 1998.

R. Steve Richardson,

Acting Commissioner, Bureau of Reclamation.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 96–18]

Alan L. Ager, D.P.M.; Revocation of Registration

On December 13, 1995, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Alan L. Ager, D.P.M., (Respondent) of Nicasio, California, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration, AA5561243, and deny any pending applications for renewal of such registration as a practitioner under 21 U.S.C. 823(f), for reason that his continued registration would be inconsistent with the public interest pursuant to 21 U.S.C. 824(a)(4).

By letter dated January 17, 1995, Respondent filed a request for a hearing, and following prehearing procedures, a hearing was held in San Francisco, California on December 10 and 11, 1996, before Administrative Law Judge Mary Ellen Bittner. At the hearing, the Government called witnesses to testify and introduced documentary evidence, however Respondent did not introduce any evidence. After the hearing, the Government was the only party to submit proposed findings of fact, conclusions of law and argument. On April 6, 1998, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision, recommending that Respondent's DEA Certificate of Registration be revoked. Neither party filed exceptions to her decision, and on May 8, 1998, Judge Bittner transmitted the record of these proceedings to the Acting Deputy Administrator.

The Acting Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Acting Deputy Administrator adopts, in full, the Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge, and his adoption is in no manner diminished by any recitation of facts, issues and conclusions herein, or of any failure to mention a matter of fact or law.

The Acting Deputy Administrator finds that Respondent is registered with DEA as a practitioner to handle controlled substances in Schedules II–V. The only controlled substance at issue in these proceedings is marijuana which is a Schedule I controlled substance.

On September 2, 1993, DEA and state law enforcement agents participated in the eradication of marijuana at several previously identified sites in Marin County, California. Thereafter, the agents conducted an aerial surveillance of Respondent's property since there was intelligence information that marijuana was being grown there and one of the state agents wanted to determine the general layout of the property for future thermal imaging. While flying over Respondent's property, the agents saw marijuana growing in a shed-like structure on the property that had a semitransparent roof. The agents identified the marijuana plants due to their distinctive brilliant green color.

A search warrant was obtained and executed at Respondent's property on September 2 and 3, 1993. The search revealed 317 marijuana plants in the shed-like structure, 712 marijuana plants in a barn-like structure, and 150 marijuana plants in a structure that was constructed with bales of hay and a white plastic sheeting roof, for a total of 1,719 marijuana plants. The agents also discovered electrical lines and fans in the haystack structure. Fans are used to facilitate the movement of carbon dioxide to the plants which encourages growth and to simulate wind which encourages stronger stalks. In addition, the agents found 75 high intensity discharge lamps in the barn. Lamps such as these are used to simulate sunlight and to facilitate the growth of the plants.

The power company was called to the property to turn off the electricity, and an inspection revealed two illegal electrical bypasses. The power company estimated the electricity stolen via the bypasses was worth $421,000.00, including interest.

A search of Respondent's residence revealed a 30-gallon garbage can containing ''shake'' material (the stalks and stems from marijuana plants), a plastic container of ground marijuana leaves, marijuana residue on a desk, half-smoked marijuana cigarettes in an ashtray, several boxes of rolling paper, several books on marijuana cultivation, a 12-gauge shotgun and $12,000.00 cash. The agents also found a key to the barn on Respondent's person.

During the execution of the search warrant, one of the agents interviewed Respondent's ex-wife. She stated that Respondent had been growing marijuana at his residence for 14 years; that the bulk of the family income came from marijuana sales; and that a friend of Respondent's hooked up the electrical bypasses.

Random samples of the plants were taken from all three buildings and analyzed. All of the samples were found to contain marijuana.

On September 22, 1993, Respondent was indicted in the United States District Court for the Northern District of California and charged under 21 U.S.C. 841(a)(1) with manufacturing and possessing marijuana with intent to distribute. On January 31, 1995, a Superseding Information charged Respondent with structuring currency transactions in violation of 32 U.S.C. 5324(3) and 5322(a). Specifically, the Information charged that Respondent did ''structure and assist in structuring * * * currency transactions with one or more domestic financial institutions, by causing approximately $129,100.00 in currency (all of which constituted the proceeds of marijuana trafficking) to be deposited in, exchange and credited to bank accounts at various banks * * *.'' Pursuant to a plea agreement, Respondent pled guilty to currency structuring and agreed to forfeit $129,100.00. On April 25, 1995, Respondent was convicted of the charge and was placed on probation for a term of three years, ordered to forfeit $129,000.00, ordered to perform 600 hours of community service, and fined $10,000.00.

On August 19, 1996, a local deputy sheriff participated in an aerial overflight of Respondent's property. He identified marijuana plants due to their distinctive green color. The plants were growing at the bottom of a slope on the property. Two subsequent flyovers by the deputy sheriff and others confirmed the deputy's opinion that marijuana was growing on Respondent's property. On September 11, 1996, a search warrant was executed at Respondent's property which revealed a total of 135 marijuana plants. These plants were subsequently analyzed which confirmed that the plants were marijuana. A search of Respondent's residence revealed dried marijuana and ''shake'' material.

On September 16, 1996, Respondent was charged in a criminal complaint with violation of California Health and Safety Code Section 11358, a felony, for the willful and unlawful planting, cultivating, harvesting, drying and processing of marijuana. There is no evidence in the record of these

proceedings as to the disposition of these charges.

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

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

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

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health or safety. These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight he deems appropriate in determining whether a registration should be revoked or an application for registration be denied. see Henry J. Schwartz, Jr., M.D., Docket No. 88–42, 54 FR 16,422 (1989).

As to factor one, there is no evidence that any action has been taken against Respondent's license to practice medicine or handle controlled substances in California. However, the Acting Deputy Administrator agrees with Judge Bittner's finding that this factor is not dispositive ''inasmuch as state licensure is a necessary but not sufficient condition for DEA registration.''

There is also no evidence regarding Respondent's experience in dispensing or conducting research with Schedule II–V controlled substances, the schedules that he's registered to handle. In addition, there is no evidence that Respondent has ever been convicted of a crime related specifically to the handling of controlled substances.

But, there is more than ample evidence that Respondent failed to comply with Federal and State laws relating to controlled substances. He operated an elaborate and sophisticated marijuana cultivation enterprise on his property in 1993. Then in 1996, following the dismantling of this operation, his arrest and conviction, Respondent continued to cultivate marijuana and was again arrested and charged for this conduct.

Respondent's blatant disregard for the laws relating to controlled substances clearly justifies the revocation of his DEA Certificate of Registration. At the hearing, Respondent offered no explanation for his conduct nor any assurances that he will no longer engage in the illegal manufacture of marijuana. As Judge Bittner and Government counsel note, a negative inference may be drawn from Respondent's silence. See Raymond A. Carlson, M.D., 53 FR 7425 (1988). Therefore, the Acting Deputy Administrator agrees with Judge Bittner's conclusion that Respondent's continued registration would be inconsistent with the public interest.

Accordingly, the Acting Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 C.F.R. 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AA5561243, previously issued to Alan L. Ager, D.P.M., be, and it hereby is, revoked. The Acting Deputy Administrator further orders that any pending applications for the renewal of such registration, be, and they hereby are, denied. This order is effective November 12, 1998.

Dated: October 5, 1998.

Donnie R. Marshall,

Acting Deputy Administrator.

[FR Doc. 98–27378 Filed 10–9–98; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 98–19]

Garth A.A. Clark, M.D.; Revocation of Registration

On January 8, 1998, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Garth A.A. Clark, M.D. (Respondent) of Texas notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration BC2334364, and deny any pending applications for registration pursuant to 21 U.S.C. 823(f) and 824(a)(3), for reason that he is not currently authorized to handle controlled substances in the State of Texas.

By letter dated March 22, 1998, Respondent filed a request for a hearing, and the matter was docketed before Administrative Law Judge Gail A. Randall. On April 2, 1998, the Government filed a Motion for Summary Disposition alleging that Respondent's request for a hearing was not timely filed and as a result, Judge Randall does not have jurisdiction over this matter. In addition, the Government alleged that Respondent is no longer authorized by the State of Texas to dispense, prescribe, administer or otherwise handle controlled substances. Judge Randall issued an Order dated April 8, 1998, wherein she provided Respondent until April 27, 1998, to respond to the Government's motion. Respondent did not file such a response.

On May 6, 1998, Judge Randall issued her Opinion and Recommended Ruling, concluding that she did have jurisdiction in this matter; finding that Respondent lacked authorization to handle controlled substances in Texas; granting the Government's Motion for Summary Disposition; and recommending that Respondent's DEA Certificate of Registration be revoked. Neither party filed exceptions to her opinion, and on June 18, 1998, Judge Randall transmitted the record of these proceedings to the Acting Deputy Administrator.

The Acting Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth. The Acting Deputy Administrator adopts, in full, the Opinion and Recommended Ruling of the Administrative Law Judge.

The Acting Deputy Administrator finds that the Government argued that Respondent did not file a timely request for a hearing. The Order to Show Cause was served on Respondent on February 20, 1998, and advised Respondent that pursuant to 21 CFR 1301.43(a), he could request a hearing within 30 days from the date of receipt of the order. Respondent's request for a hearing was dated March 22, 1998, but was not filed with DEA until March 26, 1998. Therefore, the Government argues that Respondent's request for a hearing was filed three days late, and as a result Respondent should be deemed to have waived his opportunity for a hearing pursuant to 21 CFR 1301.43(d). Judge Randall agreed with the Government's calculation that the request for a hearing was filed late. She noted however that Respondent was not represented by counsel, and that he prepared the request for a hearing on March 22, 1998, within the allotted time. Judge Randall also found that the Government would not be prejudiced by accepting Respondent's request for a hearing.

Pursuant to 21 CFR 1316.47(b), ''[t]he Administrative Law Judge, upon request and showing of good cause, may grant