attempted to locate Dr. Bigelsen in Arizona through the telephone directory and the Arizona Board of Medical Examiners without success. DEA investigators went to Dr. Bigelsen's last known address and were advised that he no longer lived there.

The Acting Deputy Administrator finds that DEA has attempted to locate Dr. Bigelsen and has determined that his whereabouts are unknown. It is evident that Dr. Bigelsen is no longer practicing medicine at the address listed on his DEA Certificate of Registration. The Acting Deputy Administrator concludes that considerable effort has been made to serve Dr. Bigelsen with the Order to Show Cause without success. Dr. Bigelsen is therefore deemed to have waived his opportunity for a hearing. The Acting Deputy Administrator now enters his final order in this matter without a hearing and based on the investigative file. 21 C.F.R. 1301.54 and 1301.57.

The Acting Deputy Administrator finds that effective May 2, 1994, the Board of Medical examiners of the State of Arizona (Board) entered into a Consent Order with Dr. Bigelsen whereby his license to practice medicine in the State of Arizona was canceled. The Board's action was a result of a plea agreement entered into by Dr. Bigelsen on or about October 21, 1993, wherein he pled guilty to charges of filing false, fictitious or fraudulent claims in violation of 18 U.S.C. 287, mail fraud in violation of 18 U.S.C. 1341, and conspiring to obstruct justice in violation of 18 U.S.C. 371. As part of the plea agreement, Dr. Bigelsen agreed to voluntarily relinquish his licenses to practice medicine in Arizona, New York and New Jersey, and his DEA Certificate of Registration. Attempts by DEA to obtain the voluntary surrender of Dr. Bigelsen's DEA Certificate of Registration have been unsuccessful.

As a result of the cancellation of his Arizona medical license, the Acting Deputy Administrator finds that Dr. Bigelsen is not currently authorized to handle controlled substances in the State of Arizona. The DEA does not have statutory authority under the Controlled Substances Act to issue or maintain a registration if the applicant or registrant is without state authority to handle controlled substances in the state in which he conducts his business. 21 U.S.C. 802(21), 823(f), and 824(a)(3). This prerequisite has been consistently upheld. See Earl G. Rozeboom, M.D., 61 FR 60,730 (1996); Charles L. Novosad, Jr., M.D., 60 FR 47,182 (1995); Dominick A. Ricci, M.D., 58 FR 51,104 (1993). Since Dr. Bigelsen is not currently authorized to handle controlled substances in the State of Arizona, he is not entitled to a DEA registration in that state.

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, BB3105992, previously issued to Harvey Bigelsen, M.D., be, and it hereby is, revoked. The Acting Deputy Administrator further orders that any pending applications for renewal of such registration be, and they hereby are, denied. This order is effective April 17, 1997.

Dated: March 11, 1997.

James S. Milford,

Acting Deputy Administrator.

[FR Doc. 97–6792 Filed 3–17–97; 8:45 am]

BILLING CODE 4410–09–M

[Docket No. 96–36]

Yu-To Hsu, M.D., Denial of Application

On May 15, 1996, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Yu-To Hsu, M.D. (Respondent), of Houston, Texas, notifying him of an opportunity to show cause as to why DEA should not deny his application for a DEA Certificate of Registration as a practitioner pursuant to 21 U.S.C. 823(f), as being inconsistent with the public interest. Specifically, the Order to Show Cause alleged that:

(1) On ten separate occasions between February 28, 1991 and November 4, 1992, [Respondent] prescribed controlled substances to undercover officers for no legitimate medical purpose. On at least seven of those occasions, [Respondent] prescribed combinations of Tylenol with codeine and Valium (diazepam) to undercover officers when [he] knew or should have known that the combination of these drugs is highly abused on the streets.

(2) Following the execution of a Federal search warrant at [Respondent's] office, on December 4, 1992, [he] voluntarily surrendered his DEA Certificate of Registration, AH8099788, as well as [his] State of Texas Controlled Substances Registration Certificate. [Respondent's] Texas Controlled Substances Registration Certificate has since been reinstated.

(3) Following [Respondent's] indictment on seven counts of unlawful prescribing of controlled substances to undercover officers, on March 30, 1993, in the District Court of Harris County, Texas, [he] pled guilty to each count of the indictment. On July 23, 1993, [Respondent was] sentenced to probation for a period of ten years with deferred adjudication, fined $10,000 and ordered to perform 1,500 hours of community service.

By letter to DEA dated June 16, 1996, counsel for Respondent replied to the Order to Show Cause, but did not request a hearing on the issues raised by the Order to Show Cause. The matter was docketed before Administrative Law Judge Mary Ellen Bittner. In a letter dated July 3, 1996, the Office of Administrative Law Judges advised counsel for Respondent that Respondent had until July 19, 1996, to file a request for a hearing or else be deemed to have waived the right to a hearing. No request for a hearing was filed on behalf of Respondent. Therefore, on July 24, 1996, Judge Bittner issued an order finding that Respondent had waived his right to a hearing, and ordering that all proceedings before her be terminated. Thereafter, the case was transmitted to the Deputy Administrator for issuance of a final order pursuant to 21 C.F.R. 1301.54(e).

According, the Acting Deputy Administrator now enters his final order in this matter pursuant to 21 C.F.R. 1301.54(e) and 1301.57, without a hearing and based on the investigative file and the letter dated July 16, 1996, from counsel for Respondent.

The Acting Deputy Administrator finds that sometime in the late 1980's or early 1990's, DEA received information from the Houston Police Department that Respondent was a major diverter of Schedule III through V controlled substances. DEA then contacted the Medicaid Fraud Division of the Texas Department of Human Services and learned that Respondent had issued a large number of controlled substance prescriptions. A subsequent survey of area pharmacies also revealed that Respondent issued a large number of controlled substance prescriptions and further revealed that he continually prescribed Tylenol with Codeine No. 4 (Tylenol No. 4), a Schedule III controlled substance, in combination with diazepam 10 mg., a Schedule IV controlled substance. At that time, this combination of drugs was being abused in the Houston area and was being sold at crack houses throughout the Houston area to help users alleviate the effects of coming off a crack cocaine high. In addition, DEA learned that on April 5, 1990, during the execution of a search warrant at a crack house by the Houston Police Department, several prescription bottles were found, containing Tylenol

No. 4 and diazepam and listing Respondent as the prescriber.

As a result of this information, DEA initiated an undercover investigation of Respondent's prescribing practices. On February 28, 1991, undercover DEA Agent #1 went to Respondent's office during which the agent indicated that she used crack cocaine and needed ''some pills . . . to mellow out.'' Respondent told her not to come back to his office and not to refer any other individuals to him, yet nonetheless issued the agent a prescription for 30 dosage units of Tylenol No. 4 and a prescription for 30 dosage units of diazepam 10 mg.

On April 4, 1991, undercover DEA Agent #2 told Respondent that she had just started to use crack cocaine and that she needed something to relax. Respondent asked the agent if she needed something to ''bring [her] down'' and told her to return to his office if she became a ''little big fidgety.'' Respondent issued the agent a prescription of 38 dosage units of diazepam 10 mg. and one for 50 dosage units of Soma, a non-controlled substance, and told the agent to return to see him and he could help her quit using crack cocaine.

Undercover DEA Agent #3 went to Respondent's office on July 31, 1991, posing as Agent #2's boyfriend. Agent #3 indicated that he smoked crack cocaine and that he had used some of the medication that Respondent had prescribed for his ''girlfriend''. The transcript of this visit indicates that Respondent stated, ''crack cocaine . . . it's a lot to satisfy a body. You know, you should buy the good stuff—cocaine. Concentration so much it stop a few puffs.'' The agent indicated that after smoking crack, ''the coming down was hurting.'' Respondent then asked, ''How many Valiums need you to get out of this state?'' Respondent issued the agent prescriptions for 30 dosage units of diazepam 10 mg. and 50 dosage units of Soma, but told the agent not to return to Respondent's office.

When Agent #3 returned to Respondent's office on September 17, 1991, he waited in the reception area for three hours. Respondent did acknowledge the agent's presence, but did not meet with the agent. The agent left Respondent's office without obtaining any controlled substances prescriptions.

On December 23, 1991, undercover Agent #4 went to Respondent's office and asked Respondent for some Valium (brand name for diazepam) or Tylenol with codeine No. 3 (Tylenol No. 3), a Schedule III controlled substance, stating that he had been using cocaine for about two years, that he's taken Tylenol No. 3 with beer in the past, and it has helped him ''come down off'' the cocaine. Respondent replied that the Tylenol No. 3 will not help him quit using cocaine, but that he will give him the medication anyway. Respondent further stated that the agent should not return to Respondent's office, and encouraged the agent to quit using cocaine. Respondent issued the agent prescriptions for 28 dosage units of diazepam 10 mg. and 30 dosage units of Tylenol No. 3.

Agent #4 returned to Respondent's office on January 29, 1992. Respondent asked the agent, ''what's your problem?'' The agent replied that, ''I just came in to see if I can get some, Tylenol 3's and some Valium.'' Respondent asked the agent why he used Tylenol No. 3 and the agent stated that, ''I use cocaine on occasion and it helps me come down after I get on it. . . .'' There was then some discussion regarding the merits of the agent selling cocaine. Respondent issued the agent a prescription for 26 dosage units of Tylenol No. 3 and a prescription for 28 dosage units of diazepam 10 mg.

On March 3, 1992, Agent #4 again returned to Respondent's office and asked for more Tylenol No. 3 and Valium. Respondent replied, ''You take too much man, you still smoking the dope?'' The agent told Respondent that he still used cocaine, and they then discussed the price of cocaine. The agent asked Respondent if he would see one of the agent's ''fiends'' who was out in the waiting room, but Respondent refused because the ''friend'' did not have any identification. Respondent issued the agent a prescription for 26 dosage units of Tylenol No. 3 and one for 28 dosage units of diazepam 10 mg.

Agnt #4 returned to Respondent's office on April 23, 1992, accompanied by undercover DEA Agent #5. Respondent first met with Agent #4 and asked the agent if he wanted some Tylenol No. 4 and Valium, and also asked the agent if he was still using cocaine. Respondent then issued the agent a prescription for 26 dosage units of Tylenol No. 4 and a prescription for 28 dosage units of diazepam 10 mg. Respondent next met with Agent #5. Agent #5 asked Respondent for some Tylenol No. 3 and some Valium because he uses cocaine and ''it helps me come down''. Respondent refused to issue the agency any controlled substance prescriptions on this occasion and encouraged the agent to stop using cocaine.

Agent #5 returned to Respondent's office on July 24, 1992. During this visit, Respondent remembered that he had not written any prescriptions for the agent on his previous visit. The agent told Respondent that he had quit using cocaine, but that he needed something because he had ''been burning the candle on both ends.'' On this occasion Respondent issued the agent a prescription for 28 dosage units of Tylenol No. 3 and a prescription for 28 dosage units of diazepam 10 mg.

On November 4, 1992, Respondent asked Agent #5 if he wanted the same medication. The agent told Respondent that he still used cocaine occasionally. Respondent issued him prescriptions for 28 dosage units of Tylenol No. 4 and 28 dosage units of diazepam 10 mg. Respondent told Agent #5 not to come to Respondent's office too often. On the same day, Respondent issued Agent #4 a prescription for 28 dosage units of Tylenol No. 4 and one for 28 dosage units of diszepam 10 mg.

As a result of this investigation, on December 4, 1992, Respondent surrendered his Texas controlled substance registration and his previous DEA Certificate of Registration, AH8099788. Subsequently, Respondent was indicted in the 179th District Court, Harris County, Texas and charged with seven counts of unlawful prescribing of controlled substances in violation of state law. On March 30, 1993, Respondent pled guilty to all seven counts, and on July 23, 1993, he was sentenced to probation for 10 years with deferred adjudication of guilt, fined $10,000.00 and ordered to perform 1,500 hours of community service.

In the letter dated June 16, 1996, Respondent's counsel asserted that Respondent ''has completed all of the terms of his deferred adjudication and his probation has been terminated,'' and that his state controlled substance license has been reinstated. Counsel also claimed that Respondent had a hearing before the state medical board in February 1994, and that Respondent's medical license ''was neither revoked nor suspended.'' There was no documentation submitted by Respondent to support any of these assertions. Regarding the undercover purchases of controlled substance prescriptions, Respondent's counsel stated, ''I would have tried an entrapment defense for [Respondent] but juries, I feel, cannot understand entrapment.''

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny an application for a DEA Certificate of Registration, if he determines that the registration would be inconsistent with the public interest. Section 823(f) requires that the following factors be considered:

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

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

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

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

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

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

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

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

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

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

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

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

Dated: March 10, 1997.

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

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[Docket No. 95–36]

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

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

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

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

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

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