depressant,[46] was a controlled substance. (Tr. 178–79 (''He asked me what a controlled substance was, and whether Xanax was a controlled substance.'').) Respondent testified that he commonly prescribes Xanax. (Tr. 778–79.)

There is additional record evidence reflecting Respondent's attitude toward diversion and his course of compliance with Arizona medical standards but further elaboration is unnecessary. As to all of these incidents, Respondent's testimony at hearing that his motivation ''was first and foremost the well-being of my patients,'' (Tr. 757), is availing, to a point. But Respondent's prepared testimony at hearing does not counter the more substantial weight properly given to his candid, un-coached remarks and behaviors toward undercover investigators posing as patients. These remarks and behaviors are telling, and I find substantial evidence that Respondent will engage in future misconduct if allowed to maintain his registration. In sum, Factor Five weighs in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.

IV. Conclusion and Recommendation

I find that a balancing of the foregoing public interest factors supports a finding that the Government has established a prima facie case in support of revocation of Respondent's registration, or denial of an application for registration.[47] I conclude by a preponderance of the evidence that the Government has proved independent grounds for revoking Respondent's COR pursuant to 21 U.S.C. § 824(a)(1), and alternatively, that the balance of the other factors in this case weighs heavily in favor of a finding that Respondent's registration would be inconsistent with the public interest under 21 U.S.C. § 823(f).

Once DEA has made its prima facie case for revocation, the burden 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 v. DEA,* 412 F.3d 165, 174 (D.C. Cir. 2005); *Humphreys v. DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz v. United States Dep't of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 Fed. Reg. 72,311, 72,311 (DEA 1980).

Additionally, where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his or her actions and demonstrate that he or she will not engage in future misconduct. *Patrick W. Stodola,* 74 Fed. Reg. 20,727, 20,735 (DEA 2009). Also, ''[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest.'' *Joseph Gaudio, M.D.,* 74 Fed. Reg. 10,083, 10,094 (DEA 2009). An agency's choice of sanction will be upheld unless unwarranted in law or without justification in fact. A sanction must be rationally related to the evidence of record and proportionate to the error committed. *See Morall v. DEA,* 412 F.3d 165, 181 (D.C. Cir. 2005) (sanction will be upheld unless unwarranted in law or without justification in fact). Finally, an ''agency rationally may conclude that past performance is the best predictor of future performance.'' *Alra Laboratories, Inc. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995).

The evidence as a whole demonstrates that Respondent has not credibly accepted responsibility for his actions, or presented evidence that could reasonably support a finding that he will not engage in future misconduct. Accordingly, Respondent has failed to rebut the Government's prima facie case. I therefore recommend that Respondent's DEA COR be revoked and any pending applications for renewal denied.

Dated: January 20, 2011

Timothy D. Wing

Administrative Law Judge

[FR Doc. 2012–14268 Filed 6–11–12; 8:45 am]

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[46] Alprazolam is a controlled substance. 21 C.F.R. § 1308.14(c) (2010). I take official notice that Xanax is a trade name for alprazolam. Respondent can dispute the facts of which I take official notice by filing a properly supported motion for reconsideration within twenty days of service of this Recommended Decision, which shall begin on the date it is mailed. *See supra* note 40. *See generally Joseph Gaudio, M.D.,* 74 Fed. Reg. 10,083, 10,088 (DEA 2009).

[47] Respondent all but concedes as much, arguing that ''Respondent is well aware that the Presiding Administrative Law Judge is likely to determine that the government has made a prima facie case against him. That having been acknowledged, the record supports by a preponderance of the evidence a finding that his continued registration is not inconsistent with the public interest.'' (Resp't Br. 31.)

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances Notice of Application

Pursuant to 21 U.S.C. 958(i), the Attorney General shall, prior to issuing a registration under this Section to a bulk manufacturer of a controlled substance in schedule I or II, and prior to issuing a regulation under 21 U.S.C. 952(a)(2) authorizing the importation of such a substance, provide manufacturers holding registrations for the bulk manufacture of the substance an opportunity for a hearing.

Therefore, in accordance with 21 CFR 1301.34(a), this is notice that on October 6, 2011, Arizona Department of Corrections, ASPC–Florence, 1305 E. Butte Avenue Florence, Arizona 85132, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of Pentobarbital (2270), a basic class of controlled substance listed in schedule II.

The facility intends to import the above listed controlled substance for legitimate use. Supplies of this particular controlled substance are inadequate and are not available in the form needed within the current domestic supply of the United States.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic class of controlled substance may file comments or objections to the issuance of the proposed registration, and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43, and in such form as prescribed by 21 CFR 1316.47.

Any such comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive Springfield, Virginia 22152; and must be filed no later than [insert date 30 days from date of publication].

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substance in schedule I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a), 21 U.S.C. 823(a), and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: June 4, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–14161 Filed 6–11–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–44]

Kwan Bo Jin, M.D.; Decision and Order

On October 13, 2011, an agency Administrative Law Judge issued the attached recommended decision. Neither party filed exceptions to the decision.

Having reviewed the entire record, I have decided to adopt the ALJ's findings of fact and conclusions of law, except for his discussion of the role of community impact evidence in agency proceedings, *see* ALJ, at 14–16; [1] which is contrary to agency precedent.[2] *See Linda Sue Cheek,* 76 FR 66972, 66973 (2011); *Mark De La Lama,* 76 FR 20011, 20020 n.20 (2011); *Bienvenido Tan,* 76 FR 17673, 17694 n.58 (2011); *Gregory D. Owens,* 74 FR 36571, 36757 & n.22 (2009). Nonetheless, my rejection of the ALJ's discussion of this issue has no effect on the outcome of this matter.

Here, the sole ground for revocation proven on this record was Respondent's having been mandatorily excluded from participating in federal health care programs pursuant to 42 U.S.C. 1320a–7(a). Respondent, however, has credibly accepted responsibility for the misconduct which led to his conviction for health care fraud, *see* 18 U.S.C. 1347, complied with the terms of his sentence, and also demonstrated that he has undertaken remedial measures. Accordingly, I have decided to adopt the ALJ's conclusion that his continued registration would be ''consistent with the public interest.'' ALJ at 20. Therefore, the Order to Show Cause will be dismissed.

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a), as well as 28 CFR 0.100(b), I order that the Order to Show Cause issued to Kwan Bo Jin, M.D., be, and it hereby is, dismissed. This Order is effective immediately.

Dated: June 4, 2012.

Michele M. Leonhart,

Administrator.

D. Linden Barber, Esq., and *Jonathan P. Novak, Esq.,* for the Government

Glen D. Crick, Esq., and *Lillian Walanka, Esq.,* for the Respondent.

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

Introduction

This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., to determine whether the Drug Enforcement Administration (''DEA'' or ''Government'') should revoke a practitioner's Certificate of Registration (''COR''), and deny any pending applications for renewal or modification. Without this registration, the practitioner, Kwan Bo Jin, M.D. (''Respondent''), of Palatine, Illinois, would be unable to lawfully possess, prescribe, dispense or otherwise handle controlled substances in the course of his practice.

On March 29, 2011, the Deputy Assistant Administrator, Office of Diversion Control, DEA, issued an Order to Show Cause (''OSC'') to Respondent, giving Respondent notice of an opportunity to show cause why the DEA should not revoke Respondent's DEA COR BJ1801580, pursuant to 21 U.S.C. 823 and 824, and deny Respondent's pending application as a practitioner for registration in Schedules II through V, alleging that Respondent has been excluded from participation in all federal health care programs as defined in 21 U.S.C. 824(a)(5). (ALJ Ex. 1, at 1.) The OSC alleged in substance: (a) Respondent is currently registered with DEA as a practitioner in Schedules II through V under DEA registration number BJ1801580, at 950 West Carolyn Drive, Palatine, Illinois; (b) Respondent's registration expired on December 31, 2009, and Respondent ''submitted a timely renewal on November 6, 2010;'' [1] (c) the United States Department of Health and Human Services (''HHS'') by letter dated April 30, 2010, notified Respondent of his exclusion from participation in all federal health programs based on his October 21, 2009 federal conviction for health care fraud pursuant to 18 U.S.C. 1347; and (d) the exclusion was effective on May 20, 2010, and remains in place until at least May 19, 2015.[2] (*Id.*)

Respondent, through counsel, timely requested a hearing, (ALJ Ex. 2), which

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[1] All citations to the ALJ's Recommended Decision are to the slip opinion as originally issued.

[2] I also do not adopt the ALJ's statement at page 7 of the slip opinion stating his conclusion ''that the reference in Section 823(f)(5) to 'other conduct which may threaten the public health and safety' would as a matter of statutory interpretation logically encompass the factors listed in Section 824(a).'' ALJ at 7 (citing *Kuen H. Chen, M.D.,* 58 FR 65401, 65402 (1993)).

To be sure, the Agency decision in *Chen* stated that ''[t]he administrative law judge has concluded here that the reference in 21 U.S.C. 823(f)(5) to 'other conduct which may threaten the public health and safety' would as a matter of statutory interpretation logically encompass the bases listed in 21 U.S.C. 824(a).'' 58 FR at 65402. However, whether this constitutes a holding or merely dictum, *Chen* is totally devoid of any indication that the traditional tools of statutory construction (*i.e,* text, structure, statutory purpose, and legislative history) were employed in reaching this conclusion. Indeed, while factor five focuses on ''other conduct,'' several of the grounds for revocation are based on a registrant's status and do not require inquiry into the nature of the underlying conduct. *See* 21 U.S.C. 824(a)(3) (authorizing revocation where registrant ''has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized'' to engage in controlled substance activities or such sanction has been recommended by competent state authority); *id.* 824(a)(5) (authorizing revocation where registrant has been excluded or is subject to exclusion from participating in federal healthcare programs under mandatory exclusion provisions). In addition, construing factor five in this manner renders superfluous factor one, which authorizes the Agency to consider the recommendation of the state licensing board or disciplinary authority, as well as the provision of section 823(f) stating that the ''[t]he Attorney General shall register practitioners . . . if the applicant is authorized to dispense . . . controlled substances under the laws of the State in which he practices.''

Finally, it should be noted that since shortly after the CSA's enactment and years before section 823(f) was amended to include the public interest factors, DEA ''has consistently held that where a registration can be revoked under section 824, it can, a fortiori, be denied under section 823 since the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next.'' *Serling Drug Co.* v. *Detroit Prescription Wholesaler, Inc.,* 40 FR 11918, 11919 (1975). *See also John R. Amato,* 40 FR 22852 (1975) (Denying application where practitioner's state license had been revoked, holding that section 823(f) ''must logically give the Administrator the authority to deny a registration if the practitioner is not authorized by the State to dispense controlled substances . . . . To hold otherwise would mean that all applications would have to be granted only to be revoked the next day under 21 U.S.C. 824(a)(3). This [A]gency has consistently held that where a registration can be revoked under section 824, it can, a fortiori, be denied under section 823.'').

Indeed, no court has ever questioned the Agency's longstanding and consistent interpretation that it has authority to deny an application on any of the grounds set forth in section 824(a). *Cf. National Muffler Dealers Assn., Inc.,* v. *United States,* 440 U.S. 472, 477 (2011) (''A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.''); *EEOC* v. *Associated Dry Goods Corp.,* 449 U.S. 590, 600 n.17 (1981) (''a contemporaneous construction deserves special deference when it has remained consistent over a long period of time'').

[1] Upon inquiry at hearing, the Government indicated that the date in the OSC was in error and should reflect November 6, 2009.

[2] At hearing, the Government raised an additional issue involving Respondent's prescribing of the Schedule II controlled substance Ritalin to a patient over a two to three month time period in or about 1996.