

would constitute a suspicious order and no experience in the manufacture or distribution of listed chemicals. While given Ms. Carter's past experience, those findings do not apply to Respondent. However, most significant for this and similar cases, the Deputy Administrator also found that "[v]irtually all of the Respondent's customers, consisting of gas station and convenience stores, are considered part of the grey market, in which large amounts of listed chemicals are diverted to the illicit manufacture of amphetamine and methamphetamine." Xtreme Enterprises, Inc., *supra*, 67 FR at 76,197.

DEA has expansively applied Xtreme Enterprises to a multitude of applicants and registrants seeking to do business in the gray market. *See e.g.*, Express Wholesale, *supra*, 69 FR 62,086; Value Wholesale, 69 FR 58,548 (2004); K & Z Enterprises, Inc., 69 FR 51,475 (2004); William E. "Bill" Smith d/b/a B & B Wholesale, 69 FR 22,559 (2004); Branex Incorporated, *supra*, 69 FR 8,682; Shop It for Profit, 69 FR 1,311 (2003); Shani Distributors, 69 FR 62,324 (2003).

As in those cases, Ms. Carter's lack of a criminal record, previous general compliance with the law and regulations and willingness to comply with regulations and guard against diversion, are far outweighed by her intent to continue selling ephedrine and pseudoephedrine exclusively in the gray market. Unlawful methamphetamine production and use is a growing public health and safety concern throughout the United States and specifically in the locality where Respondent does business. Pseudoephedrine and ephedrine are the precursor products used to manufacture methamphetamine and area laboratory operators have predominantly acquired their precursor chemicals from the customer base Respondent seeks to continue serving. While Ms. Carter may intend to avoid contributing to this problem, the risk of diversion once her listed chemicals enter the gray market is real, substantial and compelling.

This reasoning has also been applied by the Deputy Administrator in a series of final orders published after Judge Randall issued her Opinion and Recommended Ruling in the matter. *See*, Elk International, *supra*, 70 FR 24,615; TNT Distributors, Inc., *supra*, 70 FR 12,729; Titan Wholesale, Inc., *supra*, 70 FR 12,727; RAM, Inc. d/b/a American Wholesale Distribution Corp., *supra*, 70 FR 11,693; Al-Alousi, Inc., 70 FR 3,561 (2005); Volusia Wholesale, 69 FR 69,409, (2004); Prachi Enterprises, Inc., *supra*, 69 FR 69,407; CWK Enterprises, Inc. 69 FR 69,400 (2004); J & S Distributors, 69 FR 62,089 (2004);

Express Wholesale, *supra*, 69 FR 62,086; Absolute Distributing, Inc., 69 FR 62,078 (2004).

In any event, Judge Randall's recommendation that Respondent be allowed to continue distributing listed chemicals to convenience stores in Tennessee, albeit with close monitoring by DEA through the submission of a monthly log and consent to inspection without an administrative inspection warrant, has been mooted by Tennessee's recent enactment of legislation requiring that all pill and tablet pseudoephedrine products, including those marketed under traditional brand names, be sold only through registered pharmacies. As this state statute, discussed more fully under factor two, effectively bars distribution of those products throughout Tennessee's gray market, it is also relevant under factor five and weighs heavily against Respondent's continued registration. *See, e.g.*, Elk International, *supra*, 70 FR at 24,618.

Finally, as recommended by Judge Randall, due to the apparent lack of safety associated with the use of phenylpropanolamine, factor five is also relevant to Respondent's initial proposal to distribute that product. DEA has previously determined that such a request constitute a ground under factor five for denial of an application for registration. *See* J & S Distributors, *supra*, 69 FR 62,089; Gazaly Trading *supra*, 69 FR 22,561; William E. "Bill" Smith d/b/a B & B Wholesale, *supra*, 69 FR 22,559; Shani Distributors, *supra*, 68 FR 62,324. However, it is noted that after the hearing and the Government's filing of its Exceptions to the Opinion and Recommended Ruling, Respondent's Reply indicated that it did not intend to carry products containing phenylpropanolamine.

Based on the foregoing, the Deputy Administrator concludes that continuing Respondent's registration and granting its pending application for renewal would be inconsistent with the public interest.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration, 003278JIY, issued to Joy's Ideas, be, and it hereby is, revoked. Further, the pending application for renewal of said Certificate of Registration submitted by Joy's Ideas should be, and hereby is, denied.

This order is effective July 7, 2005.

Dated: May 25, 2005.

Michele M. Leonhart,
Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 04-62]

Kennard Kobrin, M.D., Revocation of Registration

On June 28, 2004, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Kennard Kobrin, M.D., (Respondent) of Fall River, Massachusetts, notifying him of an opportunity to show cause as to why DEA should not revoke his DEA Certificate of Registration AK8615013 as a practitioner pursuant to 21 U.S.C. 824(a)(2), (3) and (4), and deny any pending applications for renewal or modification of that registration pursuant to 21 U.S.C. 823(f). As a basis for revocation, the Order to Show Cause alleged that Respondent had been convicted of three state felony counts, which involved illegal prescribing of a controlled substance and Medicaid fraud. As a part of his sentence, the court ordered Respondent to cease prescribing any medications for two years, effective August 28, 2003. Therefore, the Government alleged that Respondent was no longer authorized to handle controlled substances in Massachusetts, his state of practice and DEA registration.

Respondent, through counsel, timely requested a hearing in this matter and Presiding Administrative Law Judge Mary Ellen Bittner (Judge Bittner) issued an Order for Prehearing Statements. After various motions had been filed and addressed by Judge Bittner, on November 22, 2004, the Government filed its Request for Stay of Proceedings and Motion for Summary Disposition (Motion). In that Motion it was asserted that the Massachusetts Board of Registration in Medicine (Medical Board) had revoked Respondent's license to practice medicine in that state, effective December 17, 2004, and that as a result, he was no longer authorized to handle controlled substances in the state where he is registered with DEA. Attached to the Government's Motion was a copy of the Medical Board's Final Decision & Order, dated November 17, 2004, revoking Respondent's Massachusetts medical license as of December 17, 2004.

On November 29, 2004, Judge Bittner issued an order affording Respondent an opportunity to respond to the Government's Motion. On December 13 and 14, 2004, Respondent filed his response, objecting to a summary disposition of the proceeding and requesting an indefinite stay. In it, he argued that his state criminal convictions and the Medical Board's revocation order were then-pending appear and they should not be used as a basis for adverse action on his DEA registration. However, Respondent did not deny that as of December 17, 2004, he was no longer licensed to practice medicine in Massachusetts.

On December 27, 2004, Judge Bittner issued her Opinion and Recommended Decision of the Administrative Law Judge (Opinion and Recommended Decision). In it, she granted the Government's Motion, finding Respondent lacked authorization to handle controlled substances in his state of DEA registration and she recommended that his registration be revoked.

No exceptions were filed by either party to the Opinion and Recommended Decision and on February 2, 2005, the record of these proceedings was transmitted to the Office of the DEA Deputy Administrator.

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

The Deputy Administrator finds Respondent currently holds DEA Certificate of Registration AK8615013 as a practitioner and that on November 17, 2004, the Massachusetts Medical Board revoked his license to practice medicine in that state, effective as of December 17, 2004. That action was predicated on Respondent's criminal convictions which under Massachusetts law, either undermined the public's confidence in the integrity of the medical profession or showed Respondent's lack of moral character.

The Deputy Administrator therefore finds Respondent is not currently licensed to practice medicine in Massachusetts and lacks authorization to handle controlled substances in that state.

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 business. See 21 U.S.C. 802(21), 823(f) and 824(a)(3). This prerequisite has been consistently upheld. See Stephen J. Graham, M.D., 69 FR 11,661 (2004); Dominick A. Ricci, M.D., 58 FR 51,104 (1993); Bobby Watts, M.D., 53 FR 11,919 (1998).

Here, it is clear Respondent is not currently licensed to handle controlled substances in Massachusetts, the jurisdiction in which he holds a DEA registration. Therefore, he is not entitled to registration in that state.

Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in her by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that DEA Certificate of Registration AK8615013, issued to Kennard Kobrin, M.D., be, and it hereby is, revoked. The Deputy Administrator further orders that any pending applications for renewal or modification of such registration be, and they hereby are, denied. This order is effective July 7, 2005.

Dated: May 25, 2005

Michele M. Leonhart,

Deputy Administrator.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Scott H. Nearing, D.D.S., Grant of Restricted Registration

On January 27, 2003, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Scott H. Nearing, D.D.S. (Dr. Nearing/Respondent) of Wichita, Kansas. Dr. Nearing was notified of an opportunity to show cause as to why DEA should not deny this application for a DEA Certificate of Registration as a practitioner on the grounds that his registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f).

The Order to Show Cause alleged in sum, that between April 1989 and May 1993 Dr. Nearing wrote and presented more than 100 fictitious prescriptions to local pharmacies for controlled substances and ordered narcotic and benzodiazepine controlled substances from a wholesale drug company, all for his personal use and not for legitimate medical purposes. As a result of these actions, he surrendered his DEA Certificate of Registration on June 23, 1993, and on July 11, 1994, pled guilty to one count of violating 21 U.S.C.

843(a)(3) and was sentenced to four months home confinement and placed on probation for four years. It was further alleged that between 1994 and 2000, the Kansas State Dental Board (Dental Board) took several disciplinary actions against Respondent, ranging from license suspensions in 1994 and 1998 to discipline imposed in 2000 for practicing without a license.

Respondent, acting *pro se*, requested a hearing and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. Following pre-hearing procedures, a hearing was held in Topeka, Kansas, on July 15, 2004. At the hearing, both parties called witnesses to testify and introduced documentary evidence. Subsequently, both parties filed Proposed Findings of Fact, Conclusions of Law, and Argument.

On January 3, 2005, Judge Bittner issued her Opinion and Recommended Ruling, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge (Opinion and Recommended Ruling), recommending that Respondent's application for registration as a practitioner be granted, with the following restrictions: (1) Respondent shall not write any prescriptions for himself, and shall not obtain or possess for his use any controlled substance except upon the written prescription of another licensed medical professional, and (2) for at least two years from the date of the entry of a final order in this proceeding, Respondent shall continue to attend Caduceus meetings on a monthly basis. No Exceptions to the Opinion and Recommended Ruling were filed and on February 2, 2005, Judge Bittner transmitted the record of these proceedings to the Deputy Administrator.

The Deputy Administrator has considered the record in its entirety and pursuant to 21 CFR 1316.67, hereby issues her final order based upon findings of fact and conclusions of law hereinafter set forth. The Deputy Administrator adopts in full, the recommended ruling, findings of fact and conclusions of law of the Administrative Law Judge and agrees Respondent's application should be approved, with restrictions.

The record before the Deputy Administrator shows Dr. Nearing graduated from the University of Missouri, Kansas City Dental School in 1983. In March 1984, he purchased a small dental practice from the widow of another dentist located in Overland Park, Kansas and nine years later, DEA began investigating Respondent after local pharmacies began questioning prescriptions he had written.