

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
SCOTT OWEN STANTON,) CASE NO. 07-30063 HCD
) CHAPTER 7
)
DEBTOR.)

ORDER

At South Bend, Indiana, on March 12, 2007.

Before the court is the Order of January 19, 2007, which determined that the debtor Scott Owen Stanton had demonstrated exigent circumstances meriting a waiver of the pre-petition budget and credit counseling briefing requirement. The Order directed the debtor to file proof of receipt of approved budget and credit counseling on or before March 5, 2007, or face dismissal. R. 6. The debtor failed to file such proof.

On January 16, 2007, the debtor filed a voluntary chapter 7 petition, Exhibit D (“Individual Debtor’s Statement of Compliance with Credit Counseling Requirement”), and the debtor’s “Notice of Motion for Waiver to Proceed Without Credit Counseling.”¹ See R. 1, 2. In Exhibit D, the debtor checked the following statement:

3. I certify that I requested credit counseling services from an approved agency but was unable to obtain the services during the five days from the time I made the request, and the following exigent circumstances merit a temporary waiver of the credit counseling requirement so I can file my bankruptcy case now. [Must be accompanied by a motion for determination by the court.] [Summarize exigent circumstances here.] DEBTOR IS IN CUSTODY OF THE INDIANA DEPARTMENT OF CORRECTIONS (SEE MOTION).

R.1, Ex. D, p. 2. In the “Notice of Motion for Waiver,” the debtor sought a waiver of the credit counseling requirement by presenting three exigent circumstances: (1) he is indigent; (2) he is in the custody of the Indiana Department of Corrections and is ordered to pay expenses of the work release program at the DuComb Center; and (3) his travel and movement are restricted. See R. 2.

¹ The debtor also filed an Application for waiver of the chapter 7 filing fee. The court approved the Application by Order of March 7, 2007.

The court's Order of January 19, 2007, found that the debtor's certification of exigent circumstances was satisfactory. It waived the requirement that the debtor obtain pre-petition budget and credit counseling, but required him to obtain such counseling post-petition, on or before March 5, 2007, and to file proof of receipt of that counseling. It apprised the debtor that his failure to file proof "will result in the above case being dismissed without further notice or hearing." *Id.* No proof of receipt of counseling was filed by March 5, 2007.

Section 109 of the Bankruptcy Code defines who may be a debtor. Subsection (h), added to the Bankruptcy Code on October 17, 2005, by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), requires an individual to have a budget and credit counseling briefing before he or she files bankruptcy.² *See In re Afolabi*, 343 B.R. 195, 199 (Bankr. S.D. Ind. 2006) (noting Congress's intent to require credit counseling as a prerequisite to bankruptcy protection). The statute gives a court discretion to allow a debtor to forgo credit counseling within the 180 days prior to filing a bankruptcy petition if the debtor fulfills the § 109(h)(3) certification requirements. *See* § 109(h)(3)³; *see also In re Wilson*, 346 B.R. 59, 60 n.1 (Bankr.

² Section 109(h)(1) provides, in pertinent part:

. . . [A]n individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency . . . an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

11 U.S.C. § 109(h)(1).

³ Section 109(h)(3) provides:

(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that –

- (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);
- (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and
- (iii) is satisfactory to the court.

(continued...)

N.D.N.Y. 2006) (“Code § 109(h)(3)(A) of BAPCPA permits a debtor to temporarily avoid the requirements of subsection (h)(1) of Section 109”). However, the provision merely grants an extension of time to comply with the credit counseling requirements. It does not permit a complete waiver of the requirement.⁴ See *In re Lackey*, 352 B.R. 769, 771 (Bankr. N.D.W.Va. 2006). Indeed, the credit counseling requirements of § 109(h) are mandatory. See *In re Hedquist*, 342 B.R. 295, 300 (8th Cir. B.A.P. 2006).

In this case, the court in its discretion under § 109(h)(3)(B), permitted the debtor to obtain credit counseling post-petition and granted him up to 45 days – until Monday, March 5, 2007 – after his bankruptcy filing to comply with the criteria of § 109(h)(1). The debtor has failed to fulfill the statute’s requirement by filing proof of receipt of the counseling services. Consequently, dismissal of the case is required. See *Hedquist*, 342 B.R. at 300 (“[B]ankruptcy courts have no discretion but to dismiss the case when the debtor fails to file a certification in compliance with [§ 109(h)] provisions.”).

In conclusion, the court finds that the debtor in this case is not eligible to be a debtor based on his failure to obtain the mandatory budget and credit counseling briefing within the time period granted to him under 11 U.S.C. § 109(h)(3). Accordingly, the case is dismissed.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

³(...continued)

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

11 U.S.C. § 109(h)(3).

⁴ Complete waiver of the credit counseling requirement is granted only in the extreme circumstances listed in § 109(h)(4) – incapacity, disability, or active military duty in a military combat zone. See *In re Carr*, 344 B.R. 774, 775-76 (Bankr. N.D.W.Va. 2006). A debtor’s incarceration has been determined to be an insufficient circumstance to qualify for a complete waiver of the requirement. See *In re Latovljevic*, 343 B.R. 817, 822 (Bankr. W.D. W.Va. 2006).