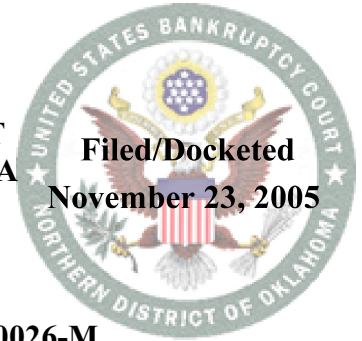


**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**



**Filed/Docketed
November 23, 2005**

IN RE:

**LAWRENCE LEE NEWLAND, III and
BRIANA GORROCHOTEGUI
NEWLAND,**

**Case No. 05-30026-M
Chapter 7**

Debtors.

ORDER DISMISSING BANKRUPTCY CASE

THIS MATTER comes before the Court for consideration of the request made by Lawrence Lee Newland, III and Briana Gorrochotegui Newland (the “Newlands”), Debtors herein, for a waiver of the requirement that they obtain budget and credit counseling prior to the filing of their bankruptcy case. The request was contained in their petition for relief under Chapter 7 of the Bankruptcy Code. Upon review, the Court finds that the petition and supporting documents offered by the Newlands do not adequately support their request for a waiver of the credit counseling requirement. As a result, the Newlands are not eligible to seek relief under the Bankruptcy Code, and this case must be dismissed.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1334(b).¹ Reference to the Court of this bankruptcy case is proper pursuant to 28 U.S.C.A. § 157(a). This is a core proceeding as contemplated by 28 U.S.C.A. § 157 (b)(2)(A).

¹ Unless otherwise noted, all statutory references are to sections of the United States Bankruptcy Code, 11 U.S.C.A. § 101 *et seq.* (West 2005). All other references to federal statutes and rules are also to West 2005 publications.

Background

On November 18, 2005, the Newlands filed a petition for relief under Chapter 7 of the Bankruptcy Code (the “Petition”).² In the Petition, the Newlands requested “a waiver of the requirement to obtain budget and credit counseling prior to filing based on exigent circumstances.”³ Attached to the Petition was a document labeled “Exhibit Certificate of appointment for credit counseling” (the “Letter”).⁴ The Letter is a one-page, hand-written document on letterhead of an entity called “Consumer Credit Counseling Service.” The hand-written text reads as follows: “Lawrence and Briana Newland have an appointment with our office on 11/23/05 at 9:30 a.m. You can contact us at (918) XXX-XXXX if you have any questions. Thank you, s/Jerri Henderson.” The document is dated November 15, 2005. Based on the content of the document, Jerri Henderson appears to be affiliated with Consumer Credit Counseling Service but is not otherwise identified.

Applicable Law

Section 109(h)(1) of the Bankruptcy Code provides that “an individual may not be a debtor under this title” unless they have received counseling from an approved credit counseling agency within the 180-day period preceding the date of filing of their petition.⁵ Section 521(b) requires that

² *Docket No. 2.*

³ *Id.*

⁴ The Court will reserve the term “certificate” to refer to a statement from an approved credit counseling agency required to be filed under § 521, which states that the agency actually provided services to a debtor and describing those services. The term “certification” will be used to refer to the statement that a debtor may file pursuant to § 109(h)(3) which seeks a temporary exemption from the pre-filing credit counseling requirement. *See In re Wallert*, ___ B.R. ___, 2005 WL 3099679, at *2 n.3 (Bankr. D. Minn. Nov. 17, 2005). As will be discussed below, the document here referred to as the “Letter” falls far below the statutory requirements for a certification under § 109(h)(3)(A).

⁵ § 109(h)(1).

a debtor evidence this counseling by filing a certificate with the court from an approved credit counseling agency that describes the services provided to the debtor.⁶ According to the Interim Federal Rules of Bankruptcy Procedure, this certificate “shall be filed with the petition in a voluntary case.”⁷

The Code provides a narrow avenue whereby a debtor may request a temporary exemption from the requirement of receiving pre-filing credit counseling.⁸ This request must come in the form of a *certification* filed with the petition⁹ that:

- (i) “describes exigent circumstances that merit a waiver” of the pre-filing counseling requirements outlined in § 109(h)(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 . . . during the 5-day period beginning on the date on which the debtor made that request”; *and*
- (iii) “is satisfactory to the court.”¹⁰

⁶ § 521(b)(1).

⁷ Fed. R. Bankr. Proc. (Interim) 1007(c) adopted in this district by Bankr. N.D. Okla. *Miscellaneous Order No. 159*. See also Fed. R. Bankr. Proc. (Interim) 1007(b)(3).

⁸ If the certification is satisfactory to the court, the debtor will be granted an exemption from the pre-filing counseling requirement until the debtor is able to meet the credit counseling requirement. Such exemption will extend no longer than 30 days after the date of filing the petition, except that the court, for cause, may order it extended an additional 15 days. § 109(h)(3)(B).

⁹ Fed. R. Bankr. Proc. (Interim) 1007(b)(3) (“Unless the United States trustee has determined that the credit counseling requirement of § 109 does not apply in the district, an individual debtor must file the certificate and debt repayment plan, if any, required by § 521(b), a certification under § 109(h)(3), or a request for a determination by the court under § 109(h)(4).”); Fed. R. Bankr. Proc. (Interim) 1007(c) (“The documents required by subdivision (b)(3) shall be filed with the petition in a voluntary case.”).

¹⁰ § 109(h)(3)(A) (emphasis added). Other exceptions to the § 109(h)(1) requirement are found in § 109(h)(2) and 109(h)(4), but there has been no indication that those sections are implicated in the present case.

These requirements are given in the conjunctive; all three must be met in order to merit a temporary exemption from the pre-filing credit counseling requirement by the court.¹¹

The requirements for a document to qualify as a certification are set out in 28 U.S.C.A. § 1746:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, **certificate**, statement, oath, or affidavit, in writing of the person making the same . . . such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is **subscribed by him, as true under penalty of perjury**, and **dated**, in substantially the following form:

...
(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)”¹²

There is no reason for the Court to find that these requirements do not apply to the certification required under § 109(h).

Discussion

In enacting the Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”), Congress created a new pre-filing credit counseling requirement for all individual debtors seeking bankruptcy protection.¹³ Under certain limited circumstances, the requirement to receive credit

¹¹ *In re Watson*, ___ B.R. ___, 2005 WL 2990902, *3 (Bankr. E.D. Va. Nov. 3, 2005) (“Section 109(h)(3)(A) should be read in the conjunctive and not in the disjunctive.”).

¹² 28 U.S.C.A. § 1746 (emphasis added). See *In re La Porta*, ___ B.R. ___, 2005 WL 3078507, at *2 (Bankr. D. Minn. Oct. 27, 2005); *In re Hubbard*, ___ B.R. ___, 2005 WL 3061939, at *2–*3 (Bankr. S.D. Tex. Nov. 8, 2005), *reconsidering In re Hubbard*, 332 B.R. 285 (Bankr. S.D. Tex. 2005).

¹³ § 109(h)(1). This requirement applies to all bankruptcy cases filed on or after October 17, 2005.

counseling can be deferred for up to 45 days post-petition with leave of the Court. In order to request a 30-day exemption from the pre-filing credit counseling requirement, a debtor is *required* to submit a certification with the petition which meets the requirements of § 109(h)(3), *to wit*, that the debtor faces exigent circumstances that merit a waiver of the pre-filing requirement, that the debtor made efforts to receive credit counseling pre-petition, but was unable to obtain those services during the 5-day period beginning on the date the request was made. Upon receipt of such a certification, the Court will then make a determination whether an exemption applies during which the debtor may obtain the required counseling services.

In this case, the Newlands did not receive the required credit counseling prior to filing the petition.¹⁴ They did not file a certification setting forth the information required by § 109(h)(3). Instead, the Newlands filed the Letter, which is an unverified statement, not made under penalty of perjury, from a person who appears to be affiliated with a credit counseling agency stating that the Newlands have a post-petition appointment to receive counseling.¹⁵ As presented to the Court, this Letter does not meet the requirements of a certification under 28 U.S.C. § 1746.¹⁶ The Letter does not contain the information required under § 109(h)(3)(A) to merit consideration by the Court as a request to defer the pre-petition credit counseling requirement. Specifically, the Letter does not set

¹⁴ See *Docket No. 2*.

¹⁵ At least one court has stated that the certification must be made by the debtor. *In re LaPorta*, ___ B.R. ___, 2005 WL 3078507, at *2; *In re Wallert*, ___ B.R. ___, 2005 WL 3099679, at *2. Because this Court finds that no certification was filed in this case, it does not reach the issue of whether the required certification under § 109(h)(3) may be made by someone other than the debtor.

¹⁶ See *In re Hubbard*, ___ B.R. ___, 2005 WL 3061939, at *2–*3 (unverified statements filed in five separate cases failed to meet requirements of certification under 28 U.S.C. § 1746). *In re La Porta*, ___ B.R. ___, 2005 WL 3078507, at *2 (unsigned statement, not made under penalty of perjury did not constitute a certification under 28 U.S.C. § 1746).

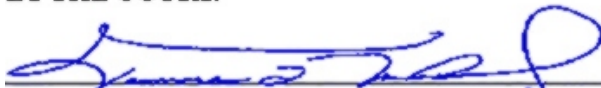
forth any exigent circumstances explaining why the Newlands were unable to complete the credit counseling requirement prior to filing their petition, nor does it indicate when the Newlands contacted this credit counseling service or that they were unable to receive counseling within 5 days of making a request for same. Absent such information, any document which purports to be a certification pursuant to § 109(h)(3)(A) will not be satisfactory to the Court.

Because the Newlands have neither met the requirements of pre-petition credit counseling under § 109(h)(1), nor filed an appropriate certification under § 109(h)(3)(A) requesting a temporary exemption from the pre-petition credit counseling requirement, the Newlands “may not be [] debtor[s] under” the Bankruptcy Code.¹⁷ Because the Newlands are not eligible to be debtors under Title 11, the Court is required by the terms of § 707(a) to dismiss this case.¹⁸

IT IS THEREFORE ORDERED that this bankruptcy case be, and the same hereby is, dismissed without prejudice to its refiling.

Dated this 23rd day of November, 2005.

BY THE COURT:



TERRENCE L. MICHAEL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

4463.3

¹⁷ § 109(h)(1).

¹⁸ See *In re Wallert*, ___ B.R. ___, 2005 WL 3099679, at *6; *In re LaPorta*, ___ B.R. ___, 2005 WL 3078507, at *4.