

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
ELIZABETH GARIVAY and EXCTOR	§	Case No. 06-40851
MATA GARIVAY,	§	(Chapter 7)
	§	
Debtors.	§	

**ORDER DENYING REQUEST TO WAIVE
CREDIT COUNSELING REQUIREMENT**

This matter is before the Court on the request made by Elizabeth and Exctor Garivay (collectively, the “Debtors”) to waive the requirement in paragraph (1) of 11 U.S.C. §109(h) that Exctor Garivay obtain budget and credit counseling prior to filing for bankruptcy. In their “Motion for Waiver of Certificate of Credit Counseling” (the “Motion”), the Debtors state that Mr. Garivay is incarcerated and “does not have access to any of the credit counseling agencies” The Debtors, however, fail to cite any authority for the relief requested in their Motion. They appear to request either a temporary waiver of the pre-petition credit counseling requirement as set forth in §109(h)(3) or, alternatively, a permanent exemption pursuant to §109(h)(4).

(1) Request for a Permanent Exemption under §109(h)(4)

Section 109(h)(1) establishes, as a condition of eligibility for any individual to file a petition for bankruptcy relief under any chapter of the Bankruptcy Code, that he or she (or, in §302(a) joint cases, they) have received an individual or group counseling from an approved budget and credit counseling agency within the 180 days preceding their petition. Under §109(h)(4), the credit counseling requirement does not apply to a debtor if the bankruptcy court determines, “after notice and a hearing,” that the debtor was

unable to complete the requirement because of “incapacity, disability, or active military duty in a military combat zone.” *See* 11 U.S.C. §102(1) (defining the phrase “notice and a hearing”). Section 109(h)(4) specifically defines disability to mean “that the debtor is so *physically impaired* as to be unable, after reasonable effort, to participate in an in person, telephone, or internet briefing required under [§109(h)(1)].” 11 U.S.C. §109(h)(4) (emphasis added).

Here, the Debtors state in the Motion that Mr. Garivay did not complete the required pre-petition credit counseling. The Debtors appear to assert that Mr. Garivay was unable to complete this requirement due to a physical impairment (*i.e.*, incarceration). However, court-imposed incarceration is not, of itself, a disability or physical impairment. *See, e.g., Kelbach v. Harris*, 634 F.2d 1304, 1308 (10th Cir. 1980) (discussing the Social Security Act, which defines “disability” for purposes of benefit payments as “inability to engage in any substantial gainful activity by determinable physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months ...”); *In re Moore*, 309 B.R. 725, 727-728 (Bankr. N.D. Tex. 2002) (in ruling that the incarcerated debtor’s father could not appear at the meeting of creditors as his son’s attorney-in-fact, court stated that “[i]ncarceration is not the same as a physical illness or incapacity”). Moreover, in this district, the required credit counseling session is available by telephone and internet. Inasmuch as a personal appearance at the credit counseling session is unnecessary, incarceration does not “disable” or “impair” an debtor from meeting the requirements of §109(h)(1).

With regard to Mrs. Garivay's request that she be permitted complete the credit counseling required by §109(h)(1) on her husband's behalf pursuant to a "Durable Statutory Power of Attorney,"¹ the Court has found no authority to support her request. Section 109(h) provides that "an individual" may not be a debtor unless "such individual" has completed a pre-petition credit counseling requirement prior to filing for bankruptcy. There is no room in this language to allow an attorney-in-fact to complete the counseling requirement for "such individual" -- especially in light of the limited exemption from the pre-petition credit counseling requirement set forth in §109(h)(4).

(2) Request for a Temporary Waiver under §109(h)(1)

The Court may not waive the pre-petition credit counseling requirement unless the debtor

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 the request; and (iii) is satisfactory to the Court.

11 U.S.C. §109(h)(3)(A). If the Court grants a debtor's request for a waiver, the debtor has 30 days from the petition date to complete the required credit counseling, except that the Court, for cause, may grant the debtor an additional 15 days.

Here, the Debtors have failed to submit an executed certification to the Court. The Debtors simply state in the Motion that Mr. Garivay is incarcerated and does not have access to any of the approved agencies that provide credit counseling services. However, even if the Court were to treat the unverified Motion as a certification by Mr.

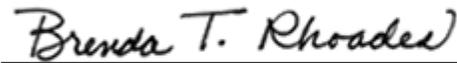
¹ Section 490 of the Texas Probate Code provides for a "statutory durable power of attorney." Section 490 states that "[a] person may use a statutory durable power of attorney to grant an attorney in fact or agent powers with respect to a person's property and financial matters."

Garivay, and assuming that Mr. Garivay's incarceration qualifies as "exigent circumstances" under §109(h)(3)(A)(i), the Debtors have not established grounds for a waiver. The Debtors' Motion does not meet the requirements of §109(h)(3)(A)(ii), because it does not indicate that Mr. Garivay ever sought credit counseling prior to filing the petition, nor does the Motion provide any evidence that Mr. Garivay was unable to receive credit counseling within five days of requesting it.

For the foregoing reasons, it is

ORDERED that the Debtors' Motion, which requests for a waiver of the pre-petition credit counseling required by 11 U.S.C. §109(h)(1) as to Mr. Garivay, shall be, and it is hereby, **DENIED**.

Signed on 6/14/2006

 MD
HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE