

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

IN RE:

EVELIA GUZMAN,

Debtor.

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Case No. 08-41080

(Chapter 7)

**MEMORANDUM OPINION AND ORDER DENYING
MOTION TO APPROVE SATISFACTION
OF CREDIT COUNSELING REQUIREMENT**

This case is before the Court on the Motion to Approve Satisfaction of Credit Counseling Requirement (the “Motion”) filed by the Debtor, Evelia Guzman. The Motion was properly served pursuant to the applicable Federal and Local Rules of Bankruptcy Procedure and contained the appropriate 20-day negative notice language pursuant to Local Bankruptcy Rule 9007. More than 20 days have passed since the Debtor filed the Motion, and no objections have been filed. However, for the reasons set forth below, the Court finds that the relief requested in the Motion must be denied.

BACKGROUND

The Debtor initiated this bankruptcy case by filing a voluntary petition for relief under Chapter 7 of the Bankruptcy Code at 4:06 p.m. on April 30, 2008. A meeting of creditors was held on June 6, 2008 pursuant to §341(a) of the Bankruptcy Code. Following the meeting, the Chapter 7 trustee filed a No Distribution Report, concluding there are no assets to administer for the benefit of creditors of this estate.

On the same day that the Debtor filed her bankruptcy petition, the Debtor filed a Certificate of Counseling. The Certificate of Counseling certifies that on November 1, 2007, at 10:54 a.m., the Debtor received the counseling required by §109(h) of the Bankruptcy Code from

an agency approved to provide credit counseling. On the day after the Debtor filed her bankruptcy petition, the Debtor filed the Motion as well as a second Certificate of Counseling. The second Certificate of Counseling certifies that on May 1, 2008, the Debtor received the counseling required by §109(h) of the Bankruptcy Code from an agency approved to provide credit counseling.

In the Motion, counsel for the Debtor states that she did not realize the Debtor's original Certificate of Counseling was more than 180 days old when she filed the Debtor's bankruptcy petition. Counsel states that she "forgot it was a leap year." As a result of this "clerical mistake," she overlooked the fact that the Debtor's original Certificate of Counseling was 181 days old as of the petition date. Upon realizing the error, counsel immediately instructed the Debtor to obtain the second, post-petition Certificate of Counseling. She argues in the Motion that the Court should exercise its authority under §105(a) of the Bankruptcy Code to find that the Debtor has satisfied §109(h)(1)'s requirement that an individual debtor must receive credit counseling in the 180 days preceding bankruptcy.

DISCUSSION

Congress has made credit counseling a requirement for an individual to be eligible for bankruptcy relief. *See In re Salazar*, 339 B.R. 622, 630 (Bankr. S.D. Tex. 2006) (discussing the legislative history surrounding the enactment of the Bankruptcy Abuse and Prevention Act of 2005). In pertinent part, §109(h)(1) of the Bankruptcy Code states that in order for an individual to be a debtor, (i) the individual must receive a "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" and (ii) the individual must receive this briefing "during the 180-day period preceding the date of filing of the petition." The

issue before the Court is whether the Court may deem that a debtor who took the required credit counseling course more than 180 days prior to bankruptcy has nonetheless complied with the 180-day requirement set forth in §109(h)(1) of the Bankruptcy Code.

Proper construction of the applicable statute – §109(h)(1) – must begin with its plain language. It is well settled that “when the statute’s language is plain, the sole function of the courts – at least where the disposition is not absurd – is to enforce it according to its terms.” *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citations and internal quotations omitted). “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Only in cases where the language of the statute is ambiguous or leads to absurdity should the Court look beyond the statute to try to ascertain the legislative intent. However, for language to be considered ambiguous, it must be susceptible to “more than one reasonable interpretation” or “more than one accepted meaning,” *Carrieri v. Jobs.com, Inc.*, 393 F.3d 508, 519 (5th Cir. 2004) (citing *U.S. v. Kay*, 359 F.3d 738, 743 (5th Cir. 2004)), and the canon against absurdities is only employed “where it is quite impossible that Congress could have intended the result ... and where the alleged absurdity is so clear as to be obvious to most anyone.” *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J. concurring in judgment).

Section 109(h)(1) as written mandates that a debtor who is an individual must receive credit counseling “during the 180-day period preceding the date of filing of the petition” in order to be eligible for bankruptcy relief. This provision, in theory, “ensures an individual contemplating bankruptcy (1) obtains credit information, (2) considers non-bankruptcy alternatives, and (3) if that individual decides to file bankruptcy, that decision is made while the

garnered information is still fresh in his or her mind.” *In re Dyer*, 381 B.R. 200, 203 (Bankr. W.D. N.C. 2007).¹ Although courts disagree as to whether “the 180-day period” includes the petition date, this Court calculates the time for obtaining pre-petition credit counseling from the precise point in time that the bankruptcy petition is filed. *See, e.g., In re Moore*, 359 B.R. 665, 673 (Bankr. E.D. Tenn. 2006) (“[I]f Congress had intended a waiting period in order to give a prospective filer a day's contemplation regarding the counseling before eligibility to file arrives, the language chosen does not produce this result in this electronic age....”). *But see, e.g., In re Murphy*, 342 B.R. 671, 673 (Bankr. D. D.C. 2006) (“It is settled that when a statute requires an act to be done within a specified number of days prior to a fixed date, the last day, namely, the fixed date, is to be excluded” (citations omitted)). The Debtor in this case does not dispute that she received credit counseling more than 180 days prior to the date and time she filed her bankruptcy petition. The Debtor is, therefore, plainly ineligible for bankruptcy relief under the clear and unambiguous language of §109(h)(1) of the Bankruptcy Code.

The Debtor’s failure to comply with §109(h)(1)’s pre-petition credit counseling requirement was not cured by her post-petition counseling. *See, e.g., In re Elmendorf*, 345 B.R. 486, 499-500 (Bankr. S.D.N.Y. 2006) (concluding that ineligibility under 109(h) is incurable); *In re Cleaver*, 333 B.R. 430 (Bankr. S.D. Ohio 2005) (§109(h)(3) is “unequivocal and allows for no other excuse or exception”). *But see In re Manalad*, 360 B.R. 288, 301 (Bankr. C.D. Cal. 2007) (concluding that the bankruptcy court has jurisdiction and discretion to allow debtor to cure “his

¹ Notably, the developing consensus appears to be that the credit counseling requirement is largely a procedural hurdle that does not actually or primarily serve the purpose of helping consumers make informed choices about whether or not to file for bankruptcy. *See, e.g., In re Enloe*, 373 B.R. 123 (Bankr. D.Colo. 2007); *In re Elmendorf*, 345 B.R. 486 (Bankr. S.D. N.Y. 2006); *In re Spears*, 355 B.R. 116 (Bankr. E.D. Wis. 2006). *See generally* David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM.BANKR.INST.L.REV. 223, 230 (Spring 2007); Jeffrey A. Deller & Nicholas E. Meriwether, *Putting Order to the Madness, BAPCPA and the Contours of the New Prebankruptcy Credit Counseling Requirements*, 16 J.BANKR.L. & PRAC. 101, 104-106 (Feb. 2007); U.S. General Accountability Office, *Bankruptcy Reform: Value of Credit Counseling Requirement Is Not Clear*, GAO-07-203, at 28- 32 (Apr. 2007).

§109(h) eligibility deficiency”). The Debtor’s invocation of this Court’s equitable authority under §105(a) is likewise to no avail – although the Court is sympathetic to the Debtor and her counsel’s mistake, and the Court appreciates counsel’s forthright attempts to address the mistake, the plain and unambiguous language of §109(h)(1) does not leave any room for an equitable exception to the 180-day requirement. This Court’s powers under §105(a) are limited as that section only “authorizes bankruptcy courts to fashion such orders as are necessary to further the substantive provisions of the Code,” and does not permit those courts to “act as roving commission[s] to do equity.” *In re Southmark Corp.*, 49 F.3d 1111, 1116 (5th Cir. 1995) (citations and internal quotations omitted). *See also, e.g., In re Valdez*, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005) (“the Court may not modify statutory language based on sympathy and must enforce the plain unambiguous language of the statute”). Using §105(a) to alter the 180-day time limit would not carry out a Bankruptcy Code provision, but would mean ignoring one. *See, e.g., In re Ruckdaschel*, 364 B.R. 724, 729 (Bankr. D. Idaho 2007) (“This Court declines to read §105(a) so broadly as to modify the time limit in §109(h)(1)....”).

IT IS THEREFORE ORDERED that the Motion shall be, and it is hereby, **DENIED**.

Signed on 6/24/2008

Brenda T. Rhoades SR
HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE