

**DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES**

FINAL AGENCY ACTION

**APPLICATION FOR APPROVAL AS A NONPROFIT BUDGET
AND CREDIT COUNSELING AGENCY, [REDACTED]**

REVIEW OF DECISION TO DENY APPROVED STATUS

[REDACTED] (“Agency”), seeks review of the decision denying its Application for Approval as a Nonprofit Budget and Credit Counseling Agency. Based upon the record before me, I affirm the decision to deny the application.^{1/}

I. Course of this Proceeding

The Agency’s application was received on August 14, 2006. By letter dated November 8, 2006, additional information was sought from the Agency. On November 17, 2006, the Agency provided supplemental information regarding its application. Thereafter, the Agency provided additional supplemental information by letters dated November 22, 2006, and February 22, 2007.

After review of the application and the supplemental information provided by the Agency, it was determined that the Agency did not satisfy the applicable standards for approval as set forth in 11 U.S.C. § 111(c). The Agency was notified of the decision and was provided an explanation for the denial by letter dated August 27, 2007 (“denial letter”). By letter dated August 29, 2007, which was received on September 7, 2007, the Agency timely sought a review of the denial (“request for review”) pursuant to the procedures established by the Interim Rule published at 28 C.F.R. Part 58. On September 27, 2007, a response to the request for review (“response”) was submitted to the Director pursuant to Interim Rule 58.17(h).

II. The Denial Decision

The denial letter set forth two main reasons why the Agency failed to satisfy the standards for approval under 11 U.S.C. § 111(c).

1. The Agency failed to demonstrate that it was a nonprofit budget and credit counseling agency that had a board of directors the majority of which: (1) are not employed by the Agency; and, (2) will not benefit financially, either directly or indirectly, from the outcome of the counseling services provided. 11 U.S.C. § 111(c)(2)(A).

^{1/} The record in this matter consists of the application and its appendices submitted by the Agency, correspondence to and from the Agency, the denial letter, the Agency’s request for review and the response thereto.

- a) The Agency's board of directors consists of three individuals: [redacted] chief executive officer of the Agency; her husband, [redacted] chief financial officer; and [redacted] education director.
- b) Two directors of the three member board of directors [redacted] and [redacted] are employed by the Agency.

2. The Agency failed to demonstrate adequate experience and background in providing credit counseling by not establishing that: (1) it had two years of accumulated experience and background in credit counseling; or (2) it had an office supervisor in each office with credit counseling experience gained over two of the previous five years. 11 U.S.C. § 111(c)(2)(G)^{2/}; 28 C.F.R. Part 58.15(f)(3).

- a) The Agency has less than the two years experience in providing credit counseling services.
- b) The Agency's principal [redacted] has less than the two years of experience in credit counseling required to qualify as an office supervisor.^{3/}

III. Request for Review

The Agency seeks review of the denial of its application on six grounds, all but two of which have subsequently been mooted.^{4/} Response at 3-4. The two remaining issues are the composition of the board of directors and the Agency's lack of adequate background and experience.

With respect to the board of directors, the Agency states that it provided by letter dated November 22, 2006, a revised list of directors and trustees. Request for Review at 1, Exhibit 2.

^{2/} The denial letter and the response to the request for review incorrectly cite 11 U.S.C. § 111(c)(2)(F) as the applicable statutory provision concerning the adequacy of the Agency's background and experience. The correct statutory subsection containing this criteria is section 111(c)(2)(G).

^{3/} Although the qualifications of another counselor were determined to be deficient in the denial letter, the Agency indicates that counselor is no longer associated with it. Request for Review at 2, Exhibit 7. Her qualifications, therefore, were not considered in this review.

^{4/} The denial letter initially identified four additional issues, as follows: (1) a false statement on the Agency's Web site; (2) a statement on the Agency's Web site that created the appearance of generating a private benefit from the services provided for an individual or a group; (3) an inconsistency in the application concerning the experience of a principal of the Agency; and (4) a potential conflict of interest between a counselor and a for-profit entity. These issues became moot after the Agency's request for review and played no part in this decision.

That list designated [redacted], [redacted], and [redacted] as directors and seven individuals as trustees. *Id.*

Concerning its background and experience, the Agency submitted a page from the *Instructions for Application for Approval as a Nonprofit Budget and Credit Counseling Agency* (Form EOUST-CC1) and quoted the following portion of those instructions:

A counselor shall be deemed to have adequate training and experience to provide credit counseling and budget analysis if the counselor is accredited or certified by a recognized independent organization, or has successfully completed a course of study acceptable to the United States Trustee and has worked a minimum of six months in a related area, including personal finance, budgeting, and debt management.

Request for Review at 2 (quoting Instructions at 5, section 5, paragraph 2, lines 1 - 6), Exhibit 3. The Agency further represented that [redacted] was certified by the National Foundation for Credit Counseling. Request for Review at 2. Additionally, the Agency asserted that [redacted] has a "maximum" of three years of experience in what it contends is the related field of real estate finance. *Id.* at 2, Exhibits 4-6.

IV. Standard of Review

In conducting this review, I must consider two factors:

1. Does the denial decision constitute an appropriate exercise of discretion?
2. Is the denial decision supported by the record?

28 C.F.R. § 58.17(i).

V. Analysis

A. Duties of the United States Trustee

Under 11 U.S.C. § 111, United States Trustees are required to approve nonprofit budget and credit counseling agencies for inclusion on a list maintained and made publicly available by the United States Bankruptcy Courts. Agencies on the approved lists are authorized to issue credit counseling certificates that individual debtors are required under 11 U.S.C. § 521(b) to file with their bankruptcy petitions. The United States Trustee may only approve a credit counseling agency for inclusion on that list if they satisfy specified statutory criteria. 11 U.S.C. § 111.

Section 111(b) of the Bankruptcy Code provides in relevant part:

(b) The United States trustee . . . shall only approve a nonprofit budget and credit counseling agency . . . as follows:

(1) The United States trustee . . . shall have thoroughly reviewed the qualifications of the nonprofit budget and credit counseling agency . . . under the standards set forth in this section, and the services . . . that will be offered by such agency . . . , and may require such agency . . . that has sought approval to provide information with respect to such review.

(2) The United States trustee . . . shall have determined that such agency . . . fully satisfies the applicable standards set forth in this section.

11 U.S.C. § 111(b).

Section 111(c) of the Bankruptcy Code sets forth the standards for approval of nonprofit budget and credit counseling agencies, the relevant portion of which are as follows:

(c)(1) The United States trustee . . . shall only approve a nonprofit budget and credit counseling agency that demonstrates that it will provide qualified counselors, maintain adequate provision for safekeeping and payment of client funds, provide adequate counseling with respect to client credit problems, and deal responsibly and effectively with other matters relating to the quality, effectiveness, and financial security of the services it provides.

(2) To be approved by the United States trustee . . . , a nonprofit budget and credit counseling agency shall, at a minimum--

- (A) have a board of directors the majority of which--
- (i) are not employed by such agency; and
 - (ii) will not directly or indirectly benefit financially from the outcome of the counseling services provided by such agency;

* * *

(E) provide adequate counseling with respect to a client's credit problems that includes an analysis of such client's current financial condition, factors that caused such financial condition, and how such client can develop a plan to respond to the problems without incurring negative amortization of debt;

* * *

(G) demonstrate adequate experience and background in providing credit counseling

Pursuant to 11 U.S.C. § 111(c), the Interim Rule states that credit counseling agencies shall:

(2) Provide trained counselors who receive no commissions or bonuses based on the outcome of the counseling services provided by such agency, and who have adequate experience, and have been adequately trained to provide counseling services to individuals in financial difficulty, including the matters described in sub-paragraph (1) of this paragraph. A counselor shall be deemed to have adequate training and experience to provide credit counseling and budget analysis if the counselor is accredited or certified by a recognized independent organization, or has successfully completed a course of study acceptable to the United States Trustee and has worked a minimum of six months in a related area, including personal finance, budgeting, and debt management. The United States Trustee Program does not endorse any specific course or certification program;

(3) Demonstrate adequate experience and background in providing credit counseling, which means, at a minimum, that an agency must:

(i) Have experience in providing credit counseling for the previous two years. Alternatively, if an agency fails to meet the two-year requirement, the agency must currently employ in each office location that serves clients at least one office supervisor with experience and background in providing credit counseling for no less than two of the five years preceding the relevant application date, including only experience obtained on or after January 1, 2003

28 C.F.R. Part 58.15(f).

B. Bases for Denial

1. Failure of the Agency to Have a Properly Constituted Board of Directors

To be approved as a nonprofit budget and credit counseling agency, an applicant must have a board of directors, the majority of whom are not employed by the Agency, 11 U.S.C. § 111(c)(2)(A)(i), and will not benefit financially, either directly or indirectly, from the services provided by the Agency, 11 U.S.C. § 111(c)(2)(A)(ii). Based on the record before me, I conclude that the Agency has failed to meet this requirement for approval.

Question 2.5 of the application form completed by the Agency, Form EOUST-CC1, requests the identity of current directors or trustees. In its application, the Agency identified only

one individual, [redacted] as a trustee and did not identify any directors. Application at 3 (attachment for question 2.5). In contrast, the Agency certified in Appendix A to the application that it had an independent board of directors, board of trustees, or other governing body, the majority of which were not employed by the Agency. Application, Appendix A at 1, ¶ 2. By letter dated November 8, 2006, an explanation was requested as to the discrepancy between the Agency's response to question 2.5 and its certification in Appendix A. Letter from Joseph DiPietro to Agency at 1-2 (question 2(c)). By letters dated November 17 and 22, 2006, the Agency responded and supplied the names of three directors: [redacted], [redacted], and [redacted]. The Agency also identified seven individuals as trustees, but did not explain what role, if any, they had in the corporate governance of the Agency.^{5/}

Also attached to the November 22, 2006, letter was the Agency's Articles of Incorporation, demonstrating that it was incorporated under the laws of the State of California as a nonprofit public benefit corporation. California law provides that the Agency, as a non-profit public benefit corporation, must have a board of directors. Cal. Corp. Code § 5210 (2007).^{6/} Section 5210 further provides that, subject to limited exceptions not applicable here, the power and authority of a non-profit public benefit corporation must be vested in a board of directors and exercised by the board or under its direction.

The Agency has not described what authority, if any, its trustees have or what role they play in the Agency. The resolution of that issue is not necessary, however, because California law establishes the board of directors as the governing body of a non-profit public benefit

^{5/} The Agency's November 17, 2006, letter was accompanied by an attachment, the narrative of which stated that the Agency had four trustees, but set forth a list of six persons under the caption of trustees: [redacted]

[redacted] In addition, the narrative in the attachment expressed the Agency's intention to add [redacted] as a trustee. By letter dated November 22, 2006, the Agency stated that [redacted] had been added as a trustee.

^{6/} Cal. Corporations Code § 5210, Title 1, Division 2, Part 2 (Nonprofit Public Benefit Corporations), Chapter 2 (Directors and Management), Article 1 (General Provisions), provides:

§ 5210 Board of directors; conduct and exercise of corporate activities, affairs and powers; delegation

Each corporation shall have a board of directors. Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (Section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.

corporation. Consequently, it is the composition of the board of directors that is the critical inquiry.

In this matter, two of the three directors identified by the Agency are [redacted] and her husband [redacted], who are, respectively, the Agency's Chief Executive Officer and Chief Financial Officer. Because both are employees of the Agency and constitute a majority on the board of directors, the Agency fails to meet the mandatory statutory requirement set forth in 11 U.S.C. § 111(c)(2)(A)(i) and may not be approved to provide credit counseling services pursuant to 11 U.S.C. § 111. In addition, [redacted] as the husband of [redacted], is an indirect beneficiary of his wife's employment by the Agency. The converse is also true. Because they comprise a majority of the board and will benefit from the Agency's operation, the composition of the present board of directors also precludes approval of the Agency's application pursuant to 11 U.S.C. § 111(c)(2)(A)(ii). I, therefore, affirm the denial of the Agency's application on these grounds.

2. Inadequate Experience and Background in Providing Credit Counseling

To be approved, an Agency must also demonstrate that it has adequate experience and background in providing credit counseling, as mandated pursuant to 11 U.S.C. § 111(c)(2)(G). Based on the record before me, I conclude that the Agency has failed to meet this requirement.

As set forth in 28 C.F.R. Part 58.15(f)(3)(i), an agency may satisfy the adequate experience and background requirement if it has experience in providing credit counseling for the previous two years. The Agency fails to satisfy this requirement. As set forth in its application, the Agency was organized on July 26, 2006, less than three weeks before the date on its application. Application at 2, question 1.9. Its Articles of Incorporation were not filed with the Office of the Secretary of State for the State of California until July 31, 2006. Attachment to November 22, 2006, letter from Agency.

If an agency does not have two years of experience and background in providing credit counseling, it may nonetheless satisfy this requirement by employing in each location serving clients "one *office supervisor* with experience and background in providing credit counseling for no less than two of the five years preceding the relevant application date . . ." 28 C.F.R. Part 58.15(f)(3)(i). (Emphasis added).

The Agency argues that it satisfies this alternative requirement for two reasons. First, it cites the instructions to Form EOUST-CC1 to the effect that a counselor is deemed to have adequate background and experience in credit counseling and budget analysis if that person is accredited or certified by a recognized independent organization or has completed an appropriate course acceptable to the United States Trustee. Request for Review at 1. The cited instructions, however, do not relate to the qualifications of a credit counseling agency itself, as addressed in 28 C.F.R. Part 58.15(f)(3)(i), but to those of an individual counselor employed by a credit counseling agency, as set forth in 28 C.F.R. Part 58.15(f)(2). Although [redacted]'s certificate from the National Foundation for Credit Counseling may enable her to satisfy the requirement for

an individual credit counselor under Interim Rule 58.15(f)(2), it does not qualify her to be employed as an office supervisor, which requires experience in credit counseling gained over two of the five years prior to the application date. Because [redacted] lacks the necessary practical experience, the Agency cannot satisfy the alternate criteria for experience and background as set forth in Interim Rule 58.15(f)(3)(i).

Second, the Agency contends that [redacted]'s prior work as a real estate agent and loan officer involved transferrable skills that afford her the necessary experience and background required to qualify as an office supervisor. Request for Review at 2 and Exhibit 6.^{7/} This argument again confuses the requirements applicable to the qualifications of a credit counseling agency itself, as opposed to those of the individual counselors employed by an agency. For the Agency to meet the adequate experience and background requirement set forth in 28 C.F.R. Part 58.15(f)(3), it must employ an office supervisor with two years experience in credit counseling. A credit counselor may qualify for employment by an approved agency with an approved course in credit counseling and six months experience in a "related area."^{8/} No such option is provided for an office supervisor, who must have two years experience specifically in "credit counseling." *Id.* This specific requirement is a logical and important one for an individual who would be expected to oversee the quality of others, whose experience is not required to be as extensive.^{9/} Based on the record before me, I conclude that the Agency has

^{7/} [redacted] resume provides, in relevant part, as follows:

^{8/} Even if the Agency were allowed to satisfy the credit counseling requirement with related experience, I find that [redacted]'s prior employment is not sufficiently related to credit counseling. Her prior employment appears to have been primarily focused on the sale of real estate and the packaging of loans necessary to complete real estate transactions. Any financial counseling in this context would have been targeted at the short-term goal of closing a sale of real property and the processing the underlying mortgage (*e.g.*, repairing a client's credit report), rather than on the long-term, comprehensive credit counseling contemplated under the statute. *See* 11 U.S.C. § 111(c)(2)(E) (describing the counseling required as including issues related to a client's current financial condition, the factors led to such financial condition, and the development of a comprehensive plan to manage the client's financial future).

^{9/} Even assuming any counseling [redacted] did during 2003 to 2005 constituted a transferrable skill, the record does not demonstrate that she has the required two years background and experience necessary for her to qualify as an office supervisor. The nature of [redacted]'s prior

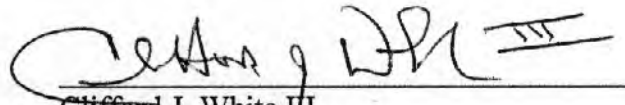
failed to meet the requirement of sufficient background and experience in credit counseling necessary for approval of its application and I affirm the denial.

VI. Conclusion

Based upon my review of the record, I affirm the denial of the application for failure of the Agency to meet the criteria of 11 U.S.C. § 111(c)(2)(A) and (c)(2)(G) and 28 C.F.R. Part 58.15(f)(3)(i). The denial of the application is supported by the record and is an appropriate exercise of discretion.

The foregoing conclusions and decisions constitute final agency action in this matter.

Dated: November 15, 2007


Clifford J. White III
Director

real estate-related employment would have necessarily involved considerable time related to non-counseling activities (e.g., representing sellers, inspecting, preparing, listing and showing properties, traveling, and other administrative matters). Further, [redacted] s resume indicates this employment was from 2003 to 2005, but does disclose whether she was employed throughout both years, or only parts of those years. Indeed, the only quantifiable background and experience in credit counseling evident from her resume was the training and employment at [redacted] [redacted] at most three to four months.