

**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] (the "Applicant") seeks review of the November 8, 2006, decision denying its application for approval as a nonprofit budget and credit counseling agency.

I. Course of this Proceeding

By application dated March 15, 2006, the Applicant applied for approval as a nonprofit budget and credit counseling agency. By letter dated March 30, 2006, additional information was sought from the Applicant (the March 30th letter). By letter dated May 15, 2006, the Applicant provided supplemental information regarding its application (the response letter). After review of the application,¹ as well as the additional supplemental information provided in the response letter, an initial determination was made that the Applicant did not satisfy the applicable standards for approval set forth in 11 U.S.C. § 111.²

A. The Denial Decision

By letter dated November 8, 2006, the Applicant was notified of the decision to deny the application and was provided with an explanation for the denial. In the denial letter, it was noted that the agency failed to satisfy the standards for approval under 11 U.S.C. § 111(c) for three distinct reasons.

1. The denial letter concludes that the Applicant is not a nonprofit organization as required by 11 U.S.C. § 111(c)(1).
 - a. Although the Applicant applied for 501(c)(3) status in April 2003, it had received a preliminary notice of adverse determination on August 17, 2005.
 - b. The Applicant purchased all of its assets from [REDACTED] a for-profit corporation, in November of 2005. The Applicant's operations are identical to that of [REDACTED]. All of [REDACTED] former employees became employees of the Applicant. Two of the owners, officers, and directors of

¹ The application was assigned number [REDACTED]

² In addition, the Interim Final Rule governing approval of nonprofit budget and credit counseling agencies was published in the Federal Register. 71 Fed. Reg. 38076 (July 5, 2006).

[redacted] are also officers and directors of the Applicant. The Applicant also assumed a contract between [redacted] a partnership; and [redacted], an Iowa nonprofit corporation. The contract provides that [redacted] will perform consulting services and [redacted] will administer debt management plans obtained by the Applicant.

c. The two owners of the for-profit corporation continue to receive a substantial private benefit from the operations of the Applicant. As a result of the [redacted] asset sale, the owners receive (through their corporate shell, [redacted] monthly payments from the Applicant as a result of the [redacted] asset sale. They are also the Applicant's landlords and receive monthly rent payments from the Applicant.

2. The denial letter concludes that the Applicant has not demonstrated that it has adequate financial resources to provide continuing support services for debt management plans as required by 11 U.S.C. § 111(c)(2)(H).

a. The Applicant's income statement indicates that the Applicant suffered a loss of \$19,057 in 2005. Although the Applicant argues that the loss is due to accounting for amortization of \$20,000 for the purchase of client accounts from [redacted] and that a positive cash flow from operations results when the amount is added back to income, the Applicant admits that it will be burdened with this non-cash expense for three years until the account is amortized.

b. The Applicant admits that its intent to seek outside grants to ensure its financial strength is contingent on its ability to secure tax exempt status, which it has been unable to do.

c. The reliability of the Applicant's data cannot be verified because neither the Applicant nor its predecessor [redacted] were audited by an independent accounting firm.

3. The denial letter concludes that the Applicant failed to demonstrate that it will provide adequate counseling under the standards set forth in the Bankruptcy Code.

B. The Request for Review

By letter dated November 27, 2006, which was received on November 28, 2006, the Applicant requested review of the denial of its application (request for review). In its request for review, the Applicant claims that each of the three bases for denial of its application are inconsistent with the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), as well as the Interim Final Rule governing the approval process and relevant pronouncements of the Internal Revenue Service. *Request for Review* at p.1. The Applicant

states its belief that it has satisfied all statutory and regulatory requirements for approval and asks that Applicant be granted approval as a nonprofit budget and credit counseling agency.

II. Standard of Review

In conducting this review, the Director must consider two factors, as provided by 28 C.F.R. § 58.17(i):

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

III. 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 clerks of the United States Bankruptcy Courts. Agencies on approved lists are authorized to issue credit counseling certificates that individual debtors are required under 11 U.S.C. § 521(b)(1) to file with the bankruptcy court.

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:

(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;
- (B) if a fee is charged for counseling services, charge a reasonable fee, and provide services without regard to ability to pay the fee;
- (C) provide for safekeeping and payment of client funds, including an annual audit of the trust accounts and appropriate employee bonding;
- (D) provide full disclosures to a client, including funding sources, counselor qualifications, possible impact on credit reports, and any costs of such program that will be paid by such client and how such costs will be paid;
- (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;
- (F) 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 subparagraph (E);
- (G) demonstrate adequate experience and background in providing credit counseling; and
- (H) have adequate financial resources to provide continuing support services for budgeting plans over the life of any repayment plan.

11 U.S.C. § 111(c).

B. Availability of Adequate Financial Resources to Provide Continuing Support Services for Debt Management Plans

The March 30th letter notes that the income statements for the 12-month period ending December 31, 2005, for both the Applicant and [redacted], reflect a net operating loss for the companies in the amount of \$19,057 and \$58,930, respectively. As a result, the Applicant was requested to explain how it could demonstrate adequate financial resources to provide continuing support services over the life of a repayment plan as required by 11 U.S.C. § 11(c)(2)(H). *March 30th Letter* at p.3. In its response letter, the Applicant stated that the \$19,057 loss includes over \$20,000 of amortization for the purchase of client accounts from [redacted]. Although the Applicant noted that it will be burdened with the non-cash expense for the next three years as the account is amortized, it also projected a positive cash flow from operations for 2006 and beyond. As a basis for this projection, the Applicant cited steps taken to reduce its expenses, as well as its belief that revenue growth "which was lacking in 2005" will increase in subsequent years due to increased demand for credit counseling services. *Response Letter* at para. 17. In addition, the Applicant stated that "to ensure its financial strength" it planned to seek outside grants to help finance its educational objectives, once its tax-exempt status was granted by the IRS. *Id.* The Applicant concedes, however, that it is having "difficulty in securing outside grants . . . and attributes this difficulty in large part to the fact that it has not yet received tax-exempt status." *Request for Review* at p. 6.

It is clear that 11 U.S.C. § 111(c)(2)(H) contemplates not only that an applicant demonstrate that it has adequate financial resources at the time it seeks approval, but it must also be able to demonstrate "at a minimum" that it has adequate financial resources to provide continuing support services over the life of any repayment plan. This requires an applicant to demonstrate its ability to sustain its operations and to provide continuing support over time. While this analysis is a prognostication, there must be reasonable assurance that an applicant meets these minimum requirements prior to approval. The Applicant projects an increase in revenue due to an increased need for credit counseling services, but it does not provide any evidence for these conclusory statements. In addition, it acknowledges that it has had to reduce its advertising expenses due to its negative cashflow, but it does not explain how it intends to capture the requisite share of the market. The Applicant also acknowledges that it is having difficulty obtaining grants, which it had earlier characterized as necessary to ensure its financial strength, due to its inability to obtain section 501(c)(3) status from the IRS.³ The financial information in the record, including the Applicant's explanation and future financial plans, fails to demonstrate that the Applicant meets the minimum standards of § 111(c)(2)(H).

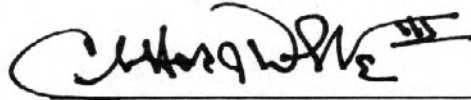
³ Despite its statement in the response letter that such funds would be used to ensure the financial strength of the Applicant, in its request for review, the Applicant disavows any need for funds from public and other grants in order to maintain financial solvency or to provide support for budgeting plans over the life of the plan. *Request for Review* at p.6.

IV. Conclusion

Based upon the foregoing, I conclude that the decision to deny the application was a proper exercise of discretion and is supported by the administrative record.⁴

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

Dated: February 5, 2007



Clifford J. White III
Director

⁴ The initial denial decision was also based on a determination that the Applicant is not a nonprofit organization and the Applicant's failure to establish the adequacy of its counseling program. However, because the Applicant's inability to establish that it meets the requirements of 11 U.S.C. § 111(c)(2)(H) is sufficient basis alone to deny the Applicant approval as a nonprofit budget and credit counseling agency, I need not reach these issues.