

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

FINAL AGENCY ACTION

**APPLICATION FOR APPROVAL AS NONPROFIT BUDGET
AND CREDIT COUNSELING AGENCY, 0805-CC-00042**

Review of Decision to Deny Approved Status

Approved Bankruptcy Certification Services (the "Applicant") seeks review of the decision denying its August 18, 2005, application for approval as a nonprofit budget and credit counseling agency.

I. Course of this Proceeding

The Applicant applied for approval as a nonprofit budget and credit counseling agency on August 18, 2005. After review of its application, the determination was made that the Applicant did not satisfy the applicable standards for approval set forth in 11 U.S.C. § 111(c). The Applicant was notified of this decision by letter (the "denial letter") dated February 7, 2006.

On June 8, 2006, attorney on behalf of the Applicant, wrote a letter to the Director of the Executive Office for United States Trustees requesting an administrative review of the denial of the application.

II. Standard of Review

In conducting this review, the Director must consider two factors:

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

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) to file with their petitions.

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. Basis for Denial¹

1. Failure to establish that it is operating as a nonprofit entity with an independent board of directors.

The denial letter asserted that the Applicant's board of directors was not sufficiently independent. While three of the four members of the board are not employed by the Applicant, two members are also on the board of directors of Harbour Credit Counseling Services ("Harbour"). [redacted] a director and president of the Applicant, is a former employee of Harbour. The Applicant has offices in the same building as Harbour. It appears from the record that the relationship between the Applicant and Harbour was a significant factor in the denial decision.

Before the summer of 2005, the Applicant engaged in traditional credit counseling and education services. The record suggests that, at one time, the Applicant had an agreement with Harbour under which Harbour provided processing services for the Applicant's clients who were enrolled in a debt management plan. In the summer of 2005, the entire board of directors of the Applicant resigned and was replaced with the board described above. The Applicant acknowledges that this change was effected to position the Applicant to provide what it terms

¹ The following discussion sets forth the specific reasons why the denial decision is being upheld. The lack of discussion of other reasons for denial set forth in the denial letter should not be construed as a determination that those reasons were not valid as well.

“certification counseling,” or counseling necessary to comply with the requirements of 11 U.S.C. § 109(h).

Harbour has not itself applied for approval as a nonprofit budget and credit counseling agency. Because Harbour establishes and administers debt management plans, it would be required to obtain a bond if it were to apply for approval. The Applicant has acknowledged that Harbour decided not to seek approval because of the bonding requirement. It is clear from the record that the plan was for the Applicant to do initial counseling and to issue bankruptcy certificates, while referring persons to Harbour for debt management plans.

Concerns over the makeup of the board of directors must be viewed in light of this arrangement. The fact that three of the four members are closely associated with Harbour supports the conclusion that the Applicant was not intended to operate as a truly independent entity, but instead as a means by which Harbour could avoid the bonding requirement. This arrangement ran directly afoul of the United States Trustee Program’s requirement that approved agencies refer clients only to other approved agencies.

While the Applicant belatedly agreed to refer clients only to approved agencies, the close ties between its board and Harbour continue. In its letter requesting review, the Applicant offered to augment its board of directors by adding two directors not related to Harbour *after* approval. While such steps to loosen the affiliation of the Applicant and Harbour might be availing if the Applicant were to reapply after they are completed, the present application cannot be approved on the basis of a promise of future action.

2. Adequacy of counseling.

During the application review process, concerns were raised over the adequacy and thoroughness of the Applicant’s counseling program. The Applicant contributed to these concerns by repeatedly referring to the services it planned to provide as “bankruptcy certification services.” While a certificate will be issued to a person who completes the credit counseling required by the Bankruptcy Code, the service which an approved agency must provide is credit counseling, not the issuance of certificates. This counseling should be of real value to individuals and should help them understand their financial situations and the alternative courses of action available to them.

These concerns were heightened by the fact that the Applicant’s proposed internet-based counseling module could be completed by a client in much less than the normal 60 to 90 minutes. By letter dated December 21, 2006, the Applicant apparently abandoned its internet services application and agreed to proceed only with telephone-based counseling in judicial districts under United States Trustee supervision. In its letter requesting review, the Applicant asserted that it needs income from counseling services to fund improvements in its counseling program. It also agreed to begin to use a hybrid telephone/internet counseling system, but only within thirty days *after* approval of its application by the United States Trustee Program.

To be approved, an agency must be prepared to provide adequate services from the date of approval.² An application cannot be approved based upon the applicant's commitment to complete its counseling program in the future. The first client seeking services from an approved agency is entitled to receive high-quality counseling. This application did not meet this standard.

IV. Conclusion

Based upon my review of the record, I affirm the decision to deny the application of Approved Bankruptcy Certification Services for approval as a nonprofit budget and crediting counseling agency.

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

Dated: September 27, 2006



Clifford J. White III
Acting Director
Executive Office for United States Trustees

² The denial letter also questioned whether the Applicant had adequate employees to provide the counseling services it was seeking to provide. The record reflects the Applicant's identification of a group of apparently experienced counselors whom the Applicant asserts were available to transfer from Harbour as their services were needed. Assuming that these persons would remain available after ties between Harbour and the Applicant were severed, this arrangement seems reasonable for a start-up agency.