

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

**In re:
SHIRLEY V. WESTOVER,
Debtor.**

**Chapter 7 Case
06-10183**



**MEMORANDUM OF DECISION and ORDER
GRANTING DEBTOR'S MOTION TO DISMISS CASE
AND DENYING DEBTOR'S MOTION TO STRIKE CASE**

On May 2, 2006 (the "Petition Date"), Shirley V. Westover (the "Debtor") filed a voluntary chapter 7 petition. The Debtor did not file a certificate of credit counseling with her petition in accordance with §109(h).¹ Consequently, the Court issued notice of a hearing to show cause why the case should not be dismissed, a hearing was held, the Debtor completed the credit counseling session, and the Debtor filed a certificate of credit counseling (doc. # 9). There is no question, however, that the Debtor did not complete the credit counseling session until after the Petition Date, rather than during the 180 days prior to the Debtor's filing, as required by the statute. The Debtor has moved to dismiss, or alternatively, to strike her case based upon her failure to obtain credit counseling prior to the Petition Date (doc. # 11). For the following reasons, the Court grants the Debtor's motion to dismiss her case and denies the Debtor's alternate request that her case be stricken.

DISCUSSION

Section 109(h), as added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), provides that an individual is not eligible to be a debtor in a bankruptcy case unless, with certain exceptions, the individual has received pre-petition credit counseling and budget briefing from an approved nonprofit agency. In this case, the Debtor did not receive the requisite pre-petition credit counseling and budget briefing pre-petition.

The Debtor does not dispute the U.S. Trustee's position that she is ineligible for bankruptcy relief in this case; the only issue is whether the appropriate legal consequence is the dismissal of the case or the striking of the petition. A number of courts, without discussing the issue, have dismissed cases filed by individuals who are not eligible under § 109(h). *E.g.*, In re Ross, 338 B.R. 134 (Bankr. N.D. Ga. 2006); In re DiPinto, 336 B.R. 693 (Bankr. E.D. Pa.2006); In re Sosa, 336 B.R. 113 (Bankr. W.D. Tex.2005); In re Rodriguez, 336 B.R. 462 (Bankr. D. Idaho 2005); In re Talib, 335 B.R. 417, reconsideration denied, 335 B.R. 424 (Bankr. W.D. Mo.2005); In re Childs, 335 B.R. 623 (Bankr. D. Md. 2005); In re Cleaver,

¹ Unless otherwise indicated, all statutory references herein are to the Bankruptcy Abuse Prevention and Consumer Protection Act (the "BAPCPA") since this case was commenced after October 17, 2005, the effective date of the BAPCPA

333 B.R. 430 (Bankr. S.D. Ohio 2005); In re Watson, 332 B.R. 740 (Bankr. E.D. Va. 2005); In re Gee, 332 B.R. 602 (Bankr. W.D. Mo. 2005).

A few courts, however, have ruled that a bankruptcy petition filed by an individual who is ineligible under § 109(h) does not commence a bankruptcy case. In re Rios, 336 B.R. 177 (Bankr. S.D. N.Y. 2005); In re Hubbard, 333 B.R. 377 (Bankr. S.D. Tex. 2005). Therefore, these courts reason, there is no case to dismiss, and instead these courts have stricken the would-be debtor's petition. Another court dismissed an ineligible individual's case, but its additional ruling that the petition “failed to provide [the individual] status as a debtor,” appears to have the same effect. In re Valdez, 335 B.R. 801 (Bankr. S.D. Fla.2005). Under these cases, as noted by the Rios court, a case initiated by an ineligible debtor's petition is void *ab initio*. Rios, *supra*, at 178-79.²

Section 301 provides that a “voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.” The Court agrees with the reasoning of In re Seaman, 340 B.R. 698 (Bankr. E.D. N.Y. 2006) and In re Tomco, 339 B.R. 145 (Bankr. W.D. Pa. 2006), that the language of Section 301 has an expansive connotation and means “might” or is meant to express a “possibility.” The operative event that triggers the commencement of a bankruptcy case, and this Court’s jurisdiction, is the filing of a petition. In re Tomco, 339 B.R. at 159; In re Ross, 338 B.R. at 138-41.

The Court concludes that eligibility under § 109 in general and under § 109(h) in particular is not jurisdictional and that, therefore, the filing of a petition by a debtor ineligible to do so nevertheless commences a bankruptcy case that is neither a “nullity” nor void *ab initio*. Consequently, upon timely determination that an individual who is not eligible to be a debtor under § 109(h) has filed a petition, the proper remedy is dismissal of the case.

This constitutes the Court’s findings of fact and conclusions of law.

THEREFORE, IT IS HEREBY ORDERED that the Debtor’s motion to dismiss her case is GRANTED and her request that the case be stricken is DENIED.

SO ORDERED.

July 11, 2006
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge

² Whether a filing by an individual ineligible under §109 commences an effective case or one that is void *ab initio* is important because the answer affects how the automatic stay of § 362(a) works in any later case that the individual might file and in the ineligible case. As the Rios court explained, striking the petition on the ground that its filing does not commence a case means that, if the individual later files a case, the stricken petition will not count as a “pending case” for purposes of applying § 162(c)(3), which terminates the automatic stay in the later case after 30 days if the debtor had another case pending within the previous year, unless the debtor proves entitlement to its extension. Rios, *supra*, at 179-80. The Valdez court concluded that the same consequence followed from its ruling that ineligibility under § 109 is jurisdictional. Valdez, *supra*. Likewise, because the filing of a petition by a debtor ineligible under §109(h) does not commence a case under the void *ab initio* rationale, no stay arises upon the filing of such a petition. Rios, *supra*, at 180 n.2.