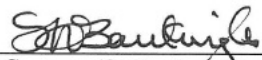




SO ORDERED.

SIGNED this 5th day of April, 2017

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**


Suzanne H. Bauknicht
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

CARLOS J. PERRY
dba ABSOLUTE COMFORT
dba TENNESSEE HEATING & COOLING

Case No. 3:17-bk-31056-SHB
Chapter 13

Debtor

**MEMORANDUM AND ORDER DISMISSING CASE FOR FAILING
TO FULFILL PRE-PETITION CREDIT COUNSELING REQUIREMENT**

This bankruptcy case commenced on April 3, 2017, by the filing of the Voluntary Petition by Debtor, acting *pro se*. Debtor did not, however, file the following required documents: Certificate of Credit Counseling; Statement About Social Security Number; Statement Regarding Payment Advices; Schedules A/B through J; Summary of Assets and Liabilities and Certain Statistical Information; Declaration About Schedules; Statement of Financial Affairs; Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period (Form 122C-1); Chapter 13 Plan; List of Creditors and Verification of Creditor Matrix; and Debtor Electronic Noticing Election form. Additionally, Debtor did not pay the \$310.00 filing fee, nor did he file an application to pay by installments.

This is Debtor's second case filed this year. The first, No. 3:17-bk-30172-SHB, was filed as a Chapter 11 case on January 23, 2017, and dismissed on March 20, 2017, for failure to obtain the pre-petition credit counseling briefing required by 11 U.S.C. § 109(h)(1). Debtor did not pay the required filing fee of \$1,717.00 and, as in this case, did not file a number of the required documents, including the Certificate of Credit Counseling; Statement Regarding Payment Advices; Schedules A/B and C; Schedules G and H; Schedule J; Summary of Assets and Liabilities and Certain Statistical Information; Statement of Financial Affairs; Chapter 11 Statement of Current Monthly Income; List of Creditors and Verification of Creditor Matrix; and Debtor Electronic Noticing Election form.

In response to Question 15 of the Voluntary Petition in this case, as well as his prior case, Debtor marked that he is not required to complete the credit counseling briefing required by 11 U.S.C. § 109(h)(1). He did not check one of the three statutory exceptions but included the handwritten explanation, "Federal prison. No access to internet and phone service." As the Court advised in its February 8, 2017 Order entered in Debtor's prior case, incarceration is not one of the three statutory exceptions to the credit counseling requirement provided by 11 U.S.C. § 109(h)(4): "[t]he requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone." Furthermore, the case law is clear that "incarceration does not amount to incapacity or disability for purposes of [§ 109(h)(1)]." *In re Kerr*, No. 14-34007, 2014 WL 6747112, at *1 (Bankr. N.D. Ohio Nov. 26, 2014); *see also In re Hobbs*, No. 12-50098, 2015 WL 1805989, at *1 (Bankr. S.D. Ga. Apr. 16, 2015). As recently stated by the Sixth Circuit Bankruptcy Appellate Panel:

As part of the Bankruptcy Abuse and Consumer Protection Act of 2005, Congress amended the Bankruptcy Code to require all individual debtors to complete a pre-petition credit briefing. 11 U.S.C. § 109(h)(1). Pursuant to § 109 of the Bankruptcy Code, if the briefing is not completed, the debtor is not eligible for bankruptcy relief and the bankruptcy court may dismiss the case. *In re Ingram*, 460 B.R. 904, 910 (6th Cir. BAP 2011).

The exceptions to this requirement are narrowly tailored. The requirement does not apply to a debtor who “the court determines, after notice and a hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone.” 11 U.S.C. § 109(h)(4). Incapacity “means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities. . . .” *Id.* Disability means that “the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).” *Id.*

....

Finally, Ramey raises policy arguments relating to the credit briefing requirement. These arguments appear to include whether incapacity and disability are reasonably defined, whether waivers should generally be more available and easier to obtain, and whether the credit briefing is of any help to debtors. Ramey is not the first, and likely not the last, to raise arguments of this nature. However, such policy arguments are for Congress to address, not the courts. The bankruptcy court can only apply the statute as it is plainly written. *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369, 374 (6th Cir. BAP 2008) (citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*), 530 U.S. 1, 6, 120 S. Ct. 1942, 1947, 147 L.Ed.2d 1 (2000)). That law was correctly applied in this instance.

In re Ramey, 558 B.R. 160, 163–64 (B.A.P. 6th Cir. 2016). “Although the court is sympathetic to debtor’s situation, his incarceration is not within the meaning of “disability” intended by Congress when they drafted § 109(h)(4), and therefore debtor does not meet the exception for permanent waiver” *In re Kerr*, No. 14-34007, 2014 WL 6747112, at *1 (Bankr. N.D. Ohio Nov. 26, 2014) (quoting *In re Star*, 341 B.R. 830, 831 (Bankr. E.D. Va. 2006)).

Likewise, although “11 U.S.C. § 109(h)(1) allows a temporary waiver of the credit counseling requirements under ‘exigent circumstances, the Debtor in this case has not described circumstances that are ‘exigent,’ therefore the statute does not apply. It is true that Debtor has

alleged that he is incarcerated. But, courts have held that mere incarceration is not a sufficient basis to waive the credit counseling requirements of the Bankruptcy Code.” *In re Baghoumian*, No. 14-70671-JAD, 2014 WL 5454233, at *1 (Bankr. W.D. Pa. Oct. 24, 2014) (stating that while inmates may have limited access to phone privileges, any such privilege offers the opportunity to obtain the required credit counseling briefing) (citing *In re Hubel*, 395 B.R. 823 (N.D.N.Y. 2008); *In re Garivay*, Slip. Op. Case No. 06-40851 (June 15, 2006, Bankr. E.D. Tex. 2006)); *see also In re Price*, No. 13-10157, 2013 WL 1655678, at *1 (Bankr. M.D. La. Apr. 12, 2013) (“[I]ncarceration alone is not an exigent circumstance justifying a temporary waiver under § 109(h)(3)(A)(i).”).

Accordingly, because Debtor did not obtain the required credit counseling briefing within the 180 days preceding the date of the filing of his petition as required by 11 U.S.C. § 109(h)(1) and did not prove that exigent circumstances merit a waiver of the requirement, the Court finds that Debtor is not eligible to be a debtor under Title 11, and directs that this bankruptcy case is DISMISSED. Should Debtor attempt to file another bankruptcy case averring that he is exempt from the credit counseling briefing requirement due to his incarceration or otherwise without proving that exigent circumstances exist – other than his incarceration – to merit a temporary waiver of the credit counseling briefing, the Court will consider dismissing said future case with prejudice and imposition of a 180-day bar.

###