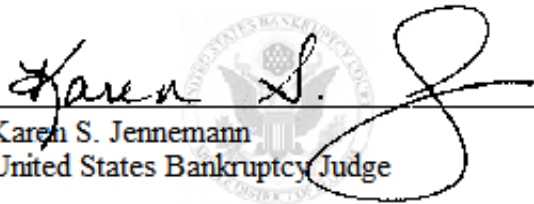


ORDERED.

Dated: May 27, 2021



Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.fmb.uscourts.gov

In re)	
)	
ADALUZ ROJAS DE BAUER,)	Case No. 6:20-bk-04228-KSJ
)	Chapter 7
Debtor.)	
)	

**AMENDED MEMORANDUM OPINION
OVERRULING TRUSTEE’S OBJECTION TO
DEBTOR’S CLAIMED FLORIDA HOMESTEAD EXEMPTION**

The issue is whether the Debtor, who is not legally permitted to permanently reside in the United States, may claim a Florida homestead exemption relying on her adult daughter’s uncertain residency status. Concluding the answer is “yes” the Court will overrule the objection filed by the Chapter 7 Trustee.¹

Adaluz Rojas De Bauer, who filed this Chapter 7 bankruptcy case on July 28, 2020,² is not a citizen of the United States. On her bankruptcy schedules, she discloses

¹ Lori Patton, the Chapter 7 Trustee, timely filed her Objection to Property Claimed as Exempt on October 27, 2020. Doc. No. 13. Debtor filed a Response. Doc. No. 17. At the hearing, held on December 9, 2020, the parties agreed the facts are not disputed. An earlier Memorandum Opinion and Order was issued. Doc. Nos. 21 and 22. Debtor moved for reconsideration, which was granted. Doc. No. 28. And, based on the additional facts demonstrated in the Debtor’s Motion for Judicial Notice (Doc. No. 32), this Amended Memorandum Opinion will overrule the Trustee’s Objection.

² Doc. No. 1.

a home (the “Home”), which she has owned for over twenty years.³ She values her 50% interest in the Home at \$148,500 and claims \$36,177.08 of her interest as exempt homestead.⁴

Debtor resides in the Home with her adult daughter and possibly other family members. Debtor’s daughter has lived in the Home from the day she arrived in the United States as a minor. Since 2012, the daughter was enrolled in the Deferred Action for Childhood Arrivals program (“DACA”). Like many other young adults, the daughter hopes to gain legal residency under DACA. She also is married to a US citizen and, in 2019, she applied for a “green card” granting her permanent legal residency, when approved.

The daughter’s husband is a U.S. citizen and enlisted in the U.S. military. Although he is deployed overseas, he claims the Home his permanent residence. So, although the Debtor has no legal residency status in the United States, both her daughter and son-in-law, who reside with her, either are US citizens or are actively seeking permission to remain permanently in the United States.

The Florida Constitution protects a debtor’s homestead from forced sale.⁵ “[T]he homestead character of a property depends upon an actual intention to reside thereon as a permanent place of residence, coupled with the fact of residence.”⁶ A

³ The Home is located at 20324 Mardi Gras Street, Orlando, Florida. Doc. No. 1, Schedule A, p. 10.

⁴ Doc. No. 9, pp. 3 and 9. The homestead exemption is established by Article X, Section 4(a)(1) of the Florida Constitution and §§222.01 and 222.02 of the Florida Statutes. Debtor asserts the Home is encumbered by a mortgage, but she is not on the mortgage. Therefore, the approximately \$36,000 claimed as exempt is equal to the Debtor’s 50% interest in Home’s *equity* not encumbered by the mortgage.

⁵ Fla. Const. art. X, §4.

⁶ *In re Harle*, 422 B.R. 310, 314 (Bankr. M.D. Fla. 2010) (quoting *In re Bennett*, 395 B.R. 781, 789 (Bankr. M.D. Fla 2008)).

debtor's homestead exemption claim is presumptively valid.⁷ Courts have emphasized that Florida's "homestead exemption is to be liberally construed in the interest of protecting the family home."⁸ "Any challenge to the homestead exemption claim places a burden on the objecting party to make a strong showing that the Debtor is not entitled to the claimed exemption."⁹

"Homeowners seeking to qualify for the homestead exemption must meet *both* an objective and subjective test. First, they must actually use and occupy the home. Second, they must express an actual intent to live permanently in the home."¹⁰

Debtor meets the first objective test. She consistently has resided at the Home since 1999. The question is whether the Debtor meets the second subjective test, relying on the residency status of her daughter and son-in-law.

Due to her immigration status, Debtor cannot form an *actual* intent to live permanently in the Home. She is not a legal resident of the United States. Courts uniformly hold homeowners who lack permanent resident status in the United States cannot claim a homestead exemption under Florida law because they subjectively cannot formulate an intent to live here forever.¹¹

A few courts have extended the right to claim Florida homestead protection, however, when the debtor has family members residing at the claimed homestead who

⁷ *Colwell v. Royal Int'l Trading Corp. (In re Colwell)*, 196 F.3d 1225, 1226 (11th Cir.1999).

⁸ *Havoco of Am., Ltd. v. Hill*, 709 So.2d 1018, 1021(Fla. 2001).

⁹ *In re Franzese*, 383 B.R. 197, 202-03 (Bankr. M.D. Fla. 2008). *See also Trustee v. Robert Laing (In re Laing)*, 329 B.R. 761, 770 (Bankr. M.D. Fla. 2005); *In re Harrison*, 236 B.R. 788, 790 (Bankr. M.D. Fla. 1999).

¹⁰ *In re Harle*, 422 B.R. 310, 314 (Bankr. M.D. Fla. 2010).

¹¹ *In re Fodor*, 339 B.R. 519, 522 (Bankr. M.D. Fla. 2006); *In re Walter*, 230 B.R. 200 (Bankr. S.D. Fla. 1999); *In re Boone*, 134 B.R. 979 (Bankr. M.D. Fla. 1991); *In re Gilman*, 68 B.R. 374 (Bankr. S.D. Fla. 1986); *Cooke v. Uransky (In re Cooke)*, 412 So.2d 340 (Fla. 1982); *Raheb v. DiBattisto*, 513 So.2d 717 (Fla. 3rd DCA 1987). *See also In re Levy*, 221 B.R. 559, 567 (Bankr.S.D.Fla.1998) ("Non-immigrant aliens in the United States on temporary rather than permanent visas are incapable of formulating the requisite intent to establish permanent residence").

are legally authorized to permanently reside in the United States. In *Oyola*, for example, the Bankruptcy Court allowed a similar debtor to claim Florida's homestead exemption when she lived with her adult daughter with a permanent residency immigration status and her granddaughter who was a United States citizen.¹² In *Grisolia*, the Florida Third District Court of Appeals allowed a family to claim homestead protection based on the temporary visa held by the homeowners (who had applied for permanent status), and their son, who resided with them, was a US citizen.¹³

Here, the daughter continuously has lived in the Home since she arrived in the United States. She actively has pursued permanent residency by enrolling in the DACA program in 2012, and by requesting a "green card" in 2019, after her marriage to a U.S. citizen.¹⁴ Her husband also considers the Home his permanent residence.

Relying on the decisions of *Mendoza* and *Solis*,¹⁵ Debtor argues her daughter's and son-in-law's residency status permit her to meet the subjective test to claim her Home as exempt under Florida law. In *Mendoza* and *Solis*, both immigrants received benefits under Florida law when, instead of a "green card" allowing permanent residency, they had arrived lawfully in the United States under temporary visas, promptly had applied for political asylum status, and had the intent to permanently reside in the United States. There, the immigrants had made a formal legal request to

¹² *In re Oyola*, 571 B.R. 874, 878-879 (Bankr. M. D. Fla. 2017).

¹³ *In re Grisolia*, 77 So.3d 732, 736 (Fla. 3d DCA 2011).

¹⁴ Doc. No. 32.

¹⁵ *In re Mendoza*, 597 B.R. 686 (Bankr. S.D. Fla. 2019)(Debtor entitled to exempt personal property under applicable federal exemptions when he had applied for political asylum and was awaiting a decision.); *Department of Health and Rehabilitative Services v. Solis*, 580 So.2d 146 (Fla. 1991)(Individual who applied for political asylum, is eligible for AFDC benefits as one permanently residing in the United States under color of law).

permanently reside in the United States and were just awaiting a decision. Although they lacked a green card and an answer to their application, they demonstrated sufficient indicia to allow them to acquire a quasi- permanent legal residency status.

The record here is even more compelling. For the Debtor to formulate an actual subjective intent to permanently reside in her Home and claim it exempt under Florida law, at least one family member living in the Home must demonstrate sufficient credible attempts to gain legal status of a permanent resident in the United States. A formal legal request is required. Debtor has met this test.

Debtor's daughter enrolled in the DACA program in 2012. She hopes one day to receive permanent legal residency status under this program. But, if she is unsuccessful under DACA, she also applied for a "green card" after her marriage to a U.S. citizen, who also subjectively considers the Home his permanent residence.

The Trustee's Objection to Exemptions¹⁶ is overruled. Debtor may claim the Home as exempt under the Florida Constitution and exclude it from property of her bankruptcy estate. A separate order consistent with this Memorandum Opinion shall be entered contemporaneously.

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Attorney Alec Solomita will serve a copy of this order on all interested parties and file a proof of service within 3 days of entry of the order.

¹⁶ Doc. No. 13.