[Attorney information] **DETAINED**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

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| **In the Matter of:** **[Client name]****In removal proceedings**  | )))))))) | **File No.: A\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** |

**RESPONDENT’S MEMORANDUM OF LAW IN OPPOSITION TO THE GOVERNMENT’S APPEAL OF THE IMMIGRATION JUDGE’S CUSTODY DETERMINATION**

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INTRODUCTION

Respondent respectfully submits this brief in opposition to the government’s appeal of the Immigration Judge’s (“IJ”) grant of bond in his case. Though the government disagrees with the IJ’s decision, her factual determinations on lack of dangerousness and flight risk are entitled to deference in the absence of clear error. The government identifies no such error. Accordingly, the Board should reject its appeal.

STATEMENT OF FACTS

**[Brief summation of procedural history and facts]**

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the immigration judge’s factual finding that petitioner will not pose a danger

to his community or a flight risk clearly erroneous?

1. Given the immigration judge’s factual findings, did the government sustain its burden

to prove dangerousness and flight by clear and convincing evidence?

STANDARD OF REVIEW

The Board is obligated to review an Immigration Judge’s findings of fact, including likelihood of dangerousness or flight risk upon release, under the “clearly erroneous” standard. 8 C.F.R. § 1003.1 (d)(3)(i); cf. Hui Lin Huang v. Holder, 677 F.3d 130, 134 (2d Cir. 2012) (“A determination of what will occur in the future and the degree of likelihood of the occurrence has been regularly regarded as fact-finding subject to only clear error review.”)

 Legal issues, including whether a party has met its burden of persuasion, are reviewed *de novo*. 8 C.F.R § 1003.1(d)(3)(ii); see also Hui Lin Huang v. Holder, 677 F.3d 130, 135 (2d Cir. 2012) (noting that the BIA “is on sound ground in its view that *de novo* review applies to the ultimate question of whether the applicant has sustained her burden”).

SUMMARY OF THE ARGUMENT

The IJ’s decision to grant bond in this case is well-reasoned, supported both by record facts and testimony and in-court testimony from the respondent. After thorough examination of evidence put forth by both parties and the receipt of in-court testimony from the respondent, the IJ made factual determinations that respondent would neither pose a danger to his community if released nor abscond if required to post a bond. Because those findings of fact are not clearly erroneous, they are entitled to deference from this Board.

The Board reviews *de novo* the legal question of whether the government sustained its burden to prove dangerousness and flight risk by clear and convincing evidence. But even if the Board were to review *de novo* the IJ’s specific findings of dangerousness and flight risk, the facts underlying those findings were not clearly erroneous and are entitled to deference. Those facts include [facts supporting grant of bond]. Such facts are strong support for the IJ’s findings that respondent is neither dangerous nor a sufficient flight risk to deny release on bond. The Board should therefore dismiss the government’s appeal.

ARGUMENT

1. the ij’s findings that respondent is neither dangerous nor a sufficient flight risk to deny bond were not clearly erroneous.

“Facts determined by the immigration judge . . . shall be reviewed only to determine whether the findings of the immigration judge are clearly erroneous.” Wu Lin v. Lynch, 813 F.3d 122, 126 (2d Cir. 2016) (quoting 8 C.F.R. § 1003.1(d)(3)(i)). Thus, where an IJ has determined from evidence presented that a respondent will not pose a danger to her community nor present a risk of flight sufficient to deny release on bond, that determination may only be overruled only if clearly erroneous. Here, the IJ’s findings were based on the totality of record evidence and were not clearly erroneous. The government’s appeal should therefore be denied.

* 1. Likelihood of Dangerousness and Flight Risk Are Findings of Fact Reviewed for Clear Error.

Likelihood of future dangerousness and flight risk are factual determinations, rather than legal issues, because they are “determination[s] of what will occur in the future and the degree of likelihood of the occurrence . . . .” Hui Lin Huang v. Holder, 677 F.3d 130, 134 (2d Cir. 2012). See also Zhou Hua Zhu v. U.S. Atty. Gen., 703 F.3d 1303, 1314 (11th Cir. 2013) (citing Hui Lin Huang with approval and holding that the likelihood of a future event is a fact subject to clear error review); Kaplun v. Attorney General of U.S., 602 F.3d 260 (3d Cir. 2010); Turkson v. Holder, 667 F.3d 523 (4th Cir. 2012); Ridore v. Holder, 696 F.3d 907 (9th Cir. 2012) (all holding that findings of probability of future events are subject to clear error review). When an IJ determines that a respondent will not pose a danger to her community nor present a risk of flight sufficient to deny release on bond, she makes a determination that the respondent is unlikely to engage in violence or flight in the future. See also Matter of Ivan Mendez-Ruiz: A087 682 577 - ELO, 2011 WL 2038450, at \*2 (DCBABR May 5, 2011) (remanding for a new bond proceeding because “the Immigration Judge’s Bond Memorandum contains *inadequate fact-finding* *and analysis* concerning whether the evidence of record . . . *reflects that the respondent poses a danger to persons or property*”) (emphasis added).

In Hui Lin Huang, the Second Circuit explained the difference between issues of fact and law. The Second Circuit vacated an order of removal in Hui Lin Huang because the BIA had engaged in *de novo* review of an IJ’s factual finding that an asylum applicant would be subject to forced sterilization if returned to her country of origin. The use of *de novo* review required a remand because “the BIA ha[d] erred in declining to consider an IJ’s finding that a future event will occur to be fact-finding subject to review for clear error.” Hui Lin Huang, 677 F.3d at 134. Future events are factual rather than legal determinations because “[a] present probability of a future event . . . while an assessment of a future event, is what a decision-maker in an adjudicatory system decides now as part of a factual framework for determining legal effect.” Id. (citing Kaplun, 602 F.3d at 269). Here, the IJ determined that there was negligible present probability that respondent would engage in dangerous conduct or flee removal proceedings if released. She then applied that factual framework to the legal question of whether the government met its burden to prove dangerousness and flight risk by clear and convincing evidence. Given the facts at issue, she correctly determined that it had not.

The Attorney General’s guidance to the Board further supports treating findings of dangerousness and flight risk as findings of fact. The Attorney General has explained that the Board’s adoption of the “clear error” standard at 8 C.F.R. § 1003.1(d)(3)(i) “encompasses the standards now commonly used by the federal courts with respect to appellate court review of findings of fact made by a trial court.” Board of Immigration Appeals: Procedural Reforms To Improve Case Management, 67 Fed.Reg. 54878–01, 54890 (Aug. 26, 2002). The Second Circuit consistently treats findings of the probability of future occurrences as findings of fact. See, e.g., In re Jackson, 593 F.3d 171, 178 (2d Cir.2010) (future earnings); National Market Share, Inc. v. Sterling National Bank, 392 F.3d 520, 529 (2d Cir.2004) (future viability of a business);

Fuchstadt v. United States, 442 F.2d 400, 402–03 (2d Cir.1971) (future earnings).

Indeed, the Second Circuit has long held that findings of dangerousness and flight risk are findings of fact subject to clear error review. “In reviewing a district court’s order granting or denying bail, we apply the clearly erroneous rule to the court’s predicate factual findings.” United States v. Berrios-Berrios, 791 F.2d 246, 250 (2d Cir. 1986) (citing United States v. Martir, 782 F.2d 1141, 1146 (2d Cir.1986); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir.1985)). “Further, a district court’s determination that, based on the predicate facts, a defendant poses a risk of flight, should not be disturbed unless it is found to have been clearly erroneous; such determinations are essentially factual and require little, if any, legal interpretation.” Id.

Longstanding case law makes clear that findings of future probability of an event’s occurrence—including future probability of violence or flight—are findings of fact subject to clear error review. Thus, the IJ’s determination here that respondent will be neither a danger to his community nor a flight risk if released are findings of fact subject to clear error review.

* 1. The IJ Did Not Clearly Error in Determining That Respondent is Neither a Danger Nor Flight Risk Sufficient to Deny Bond.

“A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Wu Lin v. Lynch, 813 F.3d 122, 126–27 (2d Cir. 2016) (internal quotations removed). This does not mean, however, that the Board may reverse the IJ’s findings here upon its own consideration of the evidence. “Indeed, the formulation can be misleading if it is misunderstood to mean that a reviewing court can reject a finding of fact simply because the court subjectively believes that the factfinder was mistaken.” Id. at 127.

Instead, a finding is clearly erroneous if there is “no evidence at all to support a finding of fact[,]” the finding is “controverted by indisputable evidence,” or “an IJ has obviously misunderstood the testimony of a witness and based a finding of fact on that misunderstanding.” Id. In short, “[i]f the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” Id. (citing

Anderson v. City of Bessemer City, N.C., 470 U.S. 573-74 (1985)). “This is so even when the district court’s findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.” Anderson, 470 U.S. at 574.

The IJ’s determination that respondent is neither dangerous nor a sufficient flight risk to deny bond is plausible. She based those determinations on the totality of the evidence presented by both parties. Though recognizing that respondent possessed a criminal record, she found that he had rehabilitated, crediting record evidence, witness statements, and testimony. [Cite to IJ decision]. She also considered the specific nature and circumstances of the respondent’s recent criminal activity and determined, based on his testimony and written evidence submitted by **[Insert the rationale behidn the IJ’s decision and be sure to specifically cite and reference the mitigating evidence you submitted.].**

The IJ’s findings that respondent was neither dangerous nor a sufficient flight risk to deny release on bond were supported by documentary evidence and testimony. Based on that evidence, those findings are plausible, and were therefore not made in clear error. The Board should deny the government’s appeal.

1. UNDER DE NOVO REVIEW, THE IJ PROPERLY found THAT the government did not sustain its burden to prove that RESPONDENT IS DANGEROUS or A FLIGHT RISK.

The BIA should review *de novo* the legal question of whether the government sustained its burden of persuasion that respondent would be a danger or flight risk if released. See Hui Lin Huang v. Holder, 677 F.3d 130, 135 (“*[D]e novo* review applies to the ultimate question of whether the applicant has sustained her burden”). But in doing so, it must give proper deference to facts that the IJ found.

As to dangerousness, those facts include that respondent [cite facts from decision that support finding that respondent is not dangerous]. As to risk of flight, those facts include that respondent [cite facts from decision that support finding that respondent is not a flight risk].

As explained above, none of these findings of fact are clearly erroneous and must therefore be accepted as true by the Board. Moreover, even if the Board were to review *de novo* the IJ’s specific findings of nondangerousness and lack of flight risk, it must do so assuming the truth of the facts above. Given that responent has rehabilitated, is likely to comply with support and rehabilitation programs, and demonstrates an understanding of the gravity of his situation, the government did not sustain its burden of proving dangerousness and flight risk by clear and convincing evidence. Its appeal should therefore be dismissed.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the BIA dismiss the government’s appeal.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_
[City, state]

 Respectfully submitted,

**[Respondent name]**

**A\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

PROOF OF SERVICE

On \_\_\_\_\_\_\_\_ \_\_\_, 201\_\_\_, I, \_\_\_\_\_\_\_\_\_\_\_\_\_, mailed a copy of

 (i) this Memorandum of Law in Opposition to the Government’s Appeal of the Immigration Judge’s Custody Determination

by Overnight Federal Express Mail. **[Change if necessary]**

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[Person who delivered]