No. 05-1432

In the Supreme Court of the United States

SERGIO LOEZA-DOMINGUEZ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, on petition for review of an order of removal in which the Board of Immigration Appeals (Board) summarily affirmed the decision of the immigration judge (IJ) and then designated the IJ's opinion as the final agency determination, the court of appeals should review the Board's procedural decision not to refer the appeal to a three-member panel for a written opinion or should instead proceed to review the agency's final determination on the merits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-7a) is reported at 428 F.3d 1156. The order of the Board of Immigration Appeals (Pet. App. 8a) and the decision of the immigration judge (Pet. App. 9a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2005. A petition for rehearing was denied on February 7, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on May 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien who has been ordered removed from the United States by an immigration judge (IJ) may appeal the order to the Board of Immigration Appeals (Board). See

8 U.S.C. 1229a(c)(4); 8 C.F.R. 1003.1(b)(1)-(3), 1240.53(a). Prior to 1999, administrative appeals from the removal orders of IJs were heard by three-member panels of the Board. On October 18, 1999, the Attorney General adopted new regulations, which were further amended on August 26, 2002, to streamline the appellate process. See 64 Fed. Reg. 56,135 (1999); 67 Fed. Reg. 54,878 (2002).

Pursuant to those rules, an appeal is assigned for initial review to a single member of the Board. 8 C.F.R. 1003.1(e). If that member finds that the result reached in the IJ's decision was correct and that any errors "were harmless or nonmaterial," and further finds that either (A) the case is "squarely controlled by existing Board or federal court precedent and do[es] not involve the application of precedent to a novel factual situation," or (B) "[t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion," the reviewing judge affirms the decision without issuing a separate opinion. 8 C.F.R. 1003.1(e)(4)(i)(A) and (B).[1] In such cases, the Board issues the following order: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4)." 8 C.F.R. 1003.1(e)(4)(ii). Because an affirmance without opinion (AWO) renders the decision of the IJ "the final agency determination," the regulation specifies that "[a]n order affirming without opinion * * * shall not include further explanation or reasoning." *Ibid*.

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[1] The regulation states that an affirmance without opinion "approves the result reached in the decision below," and that while "it does not necessarily imply approval of all of the reasoning of that decision, [it] * * * does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial." 8 C.F.R. 1003.1(e)(4)(ii).

If the alien files a petition for review in the court of appeals, the Attorney General has made clear that it is the decision of the IJ, and not the Board's summary affirmance, that is the proper subject of judicial review. See 64 Fed. Reg. at 56,137 ("The decision rendered below will be the final agency decision for judicial review purposes."); *id.* at 56,138 ("For purposes of judicial review * * * the Immigration Judge's decision becomes the decision reviewed.").

b. The impetus for the streamlining reform was the explosive increase in the caseload of the Board. See 64 Fed. Reg. at 56,136. Between 1984 and 1998, the number of new appeals and motions before the Board increased from 3000 annually to 28,000 annually. *Ibid.* Faced with such a staggering increase, the Board's ability to accomplish its mission—"to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws"—had been compromised. *Ibid.* To ameliorate that problem, the Attorney General implemented the system of streamlined appellate review. The system is premised on the recognition that "in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal." *Id.* at 56,135. In such cases, "the rule authorizes a single permanent Board Member to review the record and affirm the result reached below without issuing an opinion." *Id.* at 56,135-56,136. The result is a system that enables the Board to render decisions in a more timely manner, while husbanding its limited resources. See *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) ("[T]he agency adopted regulations that would allow it to focus a greater measure of its resources on more complicated cases.").

2. Petitioner, a citizen of Mexico, entered the United States without inspection in September 1991. In May 2002, petitioner pleaded guilty to the crime of malicious punishment of a child in violation of Minnesota law. See Minn. Stat. Ann. § 609.377 subdiv. 1 (West 2003) ("A parent * * * who, by an intentional act or a series of intentional acts with respect to a child, evidences unreasonable force or cruel discipline that is excessive under the circumstances is guilty of malicious punishment of a child."). The complaint alleged that petitioner repeatedly struck his stepson on the back and legs with an electrical cord, causing "two long, red, circular marks" on his stepson's back and a large bruise on his stepson's thigh. Pet. App. 3a, 6a.

In June 2002, the government charged petitioner with being subject to removal for having entered the United States without inspection. Petitioner conceded that he was removable, but applied for, *inter alia*, cancellation of removal. Pet. App. 3a.

3. a. The IJ ordered that petitioner be removed, determining that petitioner was ineligible for cancellation of removal. Pet. App. 9a-14a. The IJ concluded that, for two independent reasons, petitioner's conviction for malicious punishment of a child rendered him ineligible for cancellation of removal, see 8 U.S.C. 1229b(b)(1)(C): (i) petitioner was convicted of a crime of child abuse, see 8 U.S.C. 1227(a)(2)(E)(i); and (ii) petitioner was convicted of a crime involving moral turpitude, 8 U.S.C. 1227(a)(2)(A)(i). Pet. App. 12a-13a.

b. The Board affirmed the IJ's decision without opinion, pursuant to 8 C.F.R. 1003.1(e)(4). Pet. App. 8a. The Board's AWO order, as prescribed by regulation, stated that the IJ's decision "is * * * the final agency determination." *Ibid.*; see 8 C.F.R. 1003.1(e)(4)(ii).

4. Petitioner filed a petition for review, which the court of appeals denied. Pet. App. 2a-7a. The court upheld the IJ's determination that petitioner was ineligible for cancellation of removal because he had been convicted of a crime of child abuse. The court explained that the term "child abuse" in 8 U.S.C. 1227(a)(2)(E)(i) is not defined by the statute, and that a reasonable interpretation of the term by the Board thus would be accorded deference. Pet. App. 4a. The court observed that the Board had given "child abuse" a "relatively broad construction" by "citing the *Black's Law Dictionary* definition of 'child abuse' as 'any form of cruelty to a child's physical, moral, or mental well-being.'" *Id.* at 5a (quoting *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 996 (1999)). The court concluded that the Board's construction is reasonable. The court further explained that, although the IJ in this case had not explicitly defined the term "child abuse," the IJ was required by regulation to apply Board precedent defining that term. *Ibid.* (citing 8 C.F.R. 1003.1(g)).

The court rejected petitioner's argument that his conviction for malicious punishment of a child under Minnesota law could have been based on conduct that failed to qualify as "child abuse" under the Board's understanding of the term, *i.e.*, "cruelty to a child's physical, moral, or mental well-being." The court explained that the criminal complaint against petitioner "alleged that he repeatedly struck his stepson on the back and legs with the electrical cord from an iron," and that petitioner had "admitted as much during his plea hearing." Pet. App. 6a. The court also observed that the complaint alleged that petitioner's stepson had "suffered physical injuries, including two long, red, circular marks, and a large bruise on his thigh." *Ibid.* (internal quotation marks omitted). The court concluded that a "reasonable adjudicator easily could conclude that

this conduct was a form of cruelty to the child's physical, moral or mental well-being, and thus constituted child abuse as defined by the BIA." *Id.* at 6a-7a. Because the court held that petitioner had been convicted of a crime of child abuse, the court declined to reach the IJ's alternative holding that petitioner's crime was also one involving moral turpitude. *Id.* at 7a.

Finally, the court rejected petitioner's contention that it should review the Board's determination to apply its AWO procedure to this case. The court relied on its prior decision in *Ngure* v. *Ashcroft*, 367 F.3d 975 (8th Cir. 2004), which held that the Board's determination to apply its AWO procedure is committed to agency discretion and thus is not subject to judicial review. Pet. App. 7a.

ARGUMENT

1. Petitioner contends (Pet. 26-29) that this Court should grant review to resolve a disagreement among the courts of appeals on whether the courts of appeals have jurisdiction to review a determination by the Board to apply its AWO procedure. There is no warrant for granting review of that question. The Court has previously denied review of the issue, *Aleru* v. *Gonzales*, 544 U.S. 919 (2005); *Kebede* v. *Gonzales*, 544 U.S. 947 (2005), and there is no reason for a different result in this case.

a. Petitioner does not contend that the AWO procedure is facially invalid under the Constitution or the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Indeed, every court of appeals to address the question has upheld the AWO procedures against facial statutory and constitutional challenges. See *Albathani* v. *INS*, 318 F.3d 365 (1st Cir. 2003); *Zhang* v. *United States Dep't of Justice*, 362 F.3d 155 (2d Cir. 2004); *Dia* v. *Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc); *Khattak* v. *Ashcroft*, 332 F.3d 250 (4th Cir. 2003); *Soadjede* v. *Ashcroft*, 324 F.3d 830 (5th Cir.

2003) (per curiam); *Denko* v. *INS*, 351 F.3d 717 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962 (7th Cir. 2003); *Loulou* v. *Ashcroft*, 354 F.3d 706 (8th Cir. 2003), cert. denied, 543 U.S. 987 (2004); *Falcon Carriche* v. *Ashcroft*, 350 F.3d 845 (9th Cir. 2003); *Hang Kannha Yuk* v. *Ashcroft*, 355 F.3d 1222 (10th Cir. 2004); *Mendoza* v. *United States Attorney Gen.*, 327 F.3d 1283 (11th Cir. 2003).

Neither the Constitution nor the INA imposes a requirement that appeals be heard by multi-member panels. The INA provides only that an IJ shall inform an alien of "the right to appeal" the IJ's order of removal, 8 U.S.C. 1229a(c)(4), and that the IJ's "order of deportation" becomes final upon the earlier of "a determination by the Board of Immigration Appeals affirming such order" or the expiration of time in which to take an appeal, 8 U.S.C. 1101(a)(47). The government thus could, consistent with the INA, simply provide that all appeals from orders of removal are to be adjudicated by a single member of the Board, as is the case in many other administrative schemes. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) ("agencies should be free to fashion their own rules of procedure," so long as not proscribed by Congress) (internal quotation marks omitted). Cf., *e.g.*, 7 C.F.R. 1.132, 1.145 (providing that decisions of administrative law judges are appealed to a single "judicial officer" acting for the Secretary of Agriculture). There could be no constitutional doubt as to the propriety of such a regulation. See *Albathani*, 318 F.3d at 375 (observing that, even when the Board streamlines a case, the alien still has a right to a full and fair asylum hearing before the IJ, the opportunity to present her arguments to the Board, and a decision by a Board member); *Falcon Carriche*, 350 F.3d at 850 (noting that the argument that aliens are "entitled to an additional procedural safeguard—namely, review of

their appeal before three members of the BIA"—has "no support in the law").

Nor does anything in the INA or the Constitution require that the Board state its reasoning in a separate written opinion, rather than affirm on the basis of the IJ's own explanation of its holding. Indeed, even before the Attorney General adopted formal streamlining procedures, the Board (sitting in three-member panels) would frequently affirm on the basis of the IJ's opinion. The courts of appeals had uniformly upheld that practice, noting that, in such circumstances, the court was able to review the opinion of the IJ. See, *e.g.*, *Singh-Kaur* v. *INS*, 183 F.3d 1147, 1150 (9th Cir. 1999) ("When the BIA adopts an IJ's findings and reasoning, we review the IJ's opinion as if it were the opinion of the BIA."); *Dobrican* v. *INS*, 77 F.3d 164, 167 (7th Cir. 1996) ("[W]here the BIA adopts the reasoning of the IJ, we have held that the BIA adequately explains its decision when it adopts the IJ's decision, and we base our review solely on the IJ's analysis."); *Prado-Gonzalez* v. *INS*, 75 F.3d 631, 632 (11th Cir. 1996) ("[E]very court of appeals that has considered this issue (the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Tenth Circuits) has held that the Board need not write a lengthy opinion that merely repeats the immigration judge's reasons for denying the requested relief, but instead may state that it affirms the immigration judge's decision for the reasons set forth in the decision.") (collecting cases). These observations are equally valid regarding the AWO procedure, pursuant to which, when the Board affirms without opinion, the IJ's decision *is* the final agency determination. See 8 C.F.R. 1003.1(e)(4)(ii).

b. As petitioner observes (Pet. 10-20), the courts of appeals have taken differing approaches in addressing whether the Board's decision to apply its AWO procedure

in a particular case is subject to judicial review. The extent of disagreement among the circuits, however, is essentially confined to narrow circumstances not implicated here, and does not, in any event, warrant review by this Court.

i. The court of appeals correctly concluded that the Board's use of its AWO procedure is not subject to judicial review. In the court's previous opinion in *Ngure* v. *Ashcroft*, 367 F.3d 975 (8th Cir. 2004), the court provided a number of reasons in support of its conclusion that the Board's determination to utilize the AWO procedures in a particular case is "committed to agency discretion and not subject to judicial review," *id.* at 983.

First, the court recognized that, in light of separation of powers principles and deference to Executive expertise—which is especially appropriate in the immigration context—"agencies should be free to fashion their own rules of procedure" for discharging their many duties. *Ngure*, 367 F.3d at 983 (quoting *Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 543).

Second, the court determined from "the text, structure, and history of the streamlining regulations" that the Attorney General "surely did not intend to create substantive rights for aliens," *Ngure*, 367 F.3d at 983, or "to confer important procedural benefits upon individuals," *id.* at 984 (quoting *American Farm Lines* v. *Black Ball Freight Serv.*, 397 U.S. 532, 538 (1970)), by promulgating the AWO regulation. To the contrary, "judicial review of the BIA's streamlining decision would have 'disruptive practical consequences' for the Attorney General's administration of the alien removal process." *Ibid.* (quoting *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 (1979)); see *id.* at 985 ("It has never been thought that the Supreme Court would review the propriety of this court's decision to affirm a district court without opinion

* * * , as opposed to the merits of the underlying decision, and we see no reason to believe that the Department of Justice intended its comparable rule to have a different effect.").

Third, the court of appeals reasoned that the Board's decision to apply the AWO procedure to a particular case was not susceptible to a "meaningful and adequate standard of review." *Ngure*, 367 F.3d at 985. The court compared the issue to that addressed in *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987), in which this Court held that it would not separately review the ICC's decision declining to reopen a prior action on grounds of material error, because such review would merge with the Court's review of the underlying merits. *Id.* at 279.

Fourth, the court observed that the decision whether a particular case presented a sufficiently "substantial" issue to "warrant[] the issuance of a written opinion" required the exercise of the Board member's own knowledge about the Board's limited resources and expertise as to whether a published decision in a particular case, as compared with others that might present the same issue, would advance the overall administration of the Attorney General's adjudication program and the development of immigration law. *Ngure*, 367 F.3d at 986.

Additional considerations confirm that the Attorney General did not intend to create private rights by adopting the AWO procedures. Rather, their purpose was to facilitate the efficient *internal* functioning of the agency. See 64 Fed. Reg. at 56,138 ("The streamlining system will allow the Board to manage its caseload in a more timely manner while permitting it to continue providing nationwide guidance through published precedents in complex cases involving significant legal issues."); 67 Fed. Reg. at 54,888 (comparing the determination whether to issue a

written opinion to a court of appeals' decision whether to publish an opinion). Indeed, the internal administrative character of the regulation is confirmed by the subsection's heading—"[c]ase management system." 8 C.F.R. 1003.1(e). Furthermore, the regulation specifies that the member should use the AWO procedure "[i]f *the Board member determines*" that the criteria are satisfied, 8 C.F.R. 1003.1(e)(4)(i) (emphasis added), not whether the criteria *are* satisfied, thus underscoring that the decision whether to utilize the AWO procedure is one for the judgment and discretion of the Board member alone. See *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (authorization under 50 U.S.C. 403(c) (1988) to terminate CIA employees whenever the Director of Central Intelligence "'shall *deem* such termination necessary or advisable' * * * not simply when the dismissal *is* necessary or advisable," "appears * * * to foreclose the application of any meaningful judicial standard of review").

Moreover, the regulation's express statement that the IJ's opinion becomes "the final agency determination," and the provision that the single Board member will not make any statement apart from specifying that the decision of the IJ will be the final agency decision, 8 C.F.R. 1003.1(e)(4)(ii), make clear that the Attorney General intended the courts of appeals to review the underlying decision of the IJ rather than that of the single Board member. See *Tsegay* v. *Ashcroft*, 386 F.3d 1347, 1357 (10th Cir. 2004) (noting that the only way to review the Board member's decision to apply the AWO procedure would be by "first remanding the case for an expanded explanation of why the BIA chose to apply the AWO regulation," which "would require the BIA to do exactly what it is prohibited from doing when it affirms without opinion"). Indeed, the Attorney General's explanation of the AWO procedures explicitly states that

"[f]or purposes of judicial review * * * the Immigration Judge's decision becomes the decision reviewed." 64 Fed. Reg. at 56,138. The Attorney General's view that his own AWO regulations create no judicially-enforceable rights is "controlling," since it is neither "plainly erroneous [n]or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

ii. In agreement with the Eighth Circuit's decision in *Ngure*, the Second Circuit and Tenth Circuit have likewise held that they lack jurisdiction to review the Board's determination to apply its AWO procedure. See *Kambolli* v. *Gonzales*, 449 F.3d 454 (2d Cir. 2006); *Tsegay*, 386 F.3d at 1337 (10th Cir.).

As petitioner observes (Pet. 10), the Fifth and First Circuits, in *Zhu* v. *Ashcroft*, 382 F.3d 521, 527 (5th Cir. 2004), and *Haoud* v. *Ashcroft*, 350 F.3d 201, 205-206 (1st Cir. 2003), have addressed the reviewability of an AWO determination in a particular circumstance not present in this case. Both *Zhu* and *Haoud* were cases in which it was unclear whether the Board had affirmed the IJ's order denying asylum on the ground that the asylum application was untimely, in which case the court of appeals could not review the determination, see 8 U.S.C. 1158(a)(3), or because it found the standard for asylum unmet, which would be subject to review, 8 U.S.C. 1252(a)(2)(B)(ii). See *Zhu*, 382 F.3d at 527; *Haoud*, 350 F.3d at 206. In such a circumstance, the Fifth Circuit was of the view that it would find itself in "a jurisdictional conundrum," *Zhu*, 382 F.3d at 527, not knowing whether it had jurisdiction, and that a remand to the Board thus would be appropriate. See also *Lanza* v. *Ashcroft*, 389 F.3d 917, 932 (9th Cir. 2004) (remanding in same situation); *San Pedro* v. *Ashcroft*, 395 F.3d 1156, 1157-1158 (9th Cir. 2005) (same). That "jurisdictional conun-

drum" is not present in this case, and petitioner does not contend otherwise.[2]

Petitioner does argue (Pet. 26-27) that the decision below conflicts with the Third Circuit's decision in *Smriko* v. *Ashcroft*, 387 F.3d 279 (2004). That contention lacks merit. The Third Circuit held in *Smriko* that, in certain narrow situations, review of the Board's AWO determination is appropriate. See *id.* at 296-297. The Third Circuit emphasized in *Smriko*, however, that it did *not* endorse a general practice of reviewing the Board's determination to apply its AWO procedure separate from the underlying merits. On the contrary, the Third Circuit recognized that, even on its view, "[i]n many situations * * * a streamlining decision * * * will have no material impact on a court's exercise of its judicial review function" and, in such cases, "the reviewing court may simply choose to address the merits of the IJ's decision without resolving the procedural challenge." *Id.* at 296; see also *Chong Shin Chen* v. *Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004) (explaining that "in most cases" review of the Board's determination to apply its AWO procedure and of the IJ's decision on the merits "collapse into one analysis") (citation and internal quotation marks omitted).[3]

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[2] The particular problem confronted in *Zhu* and *Haoud* would not warrant review by this Court in any event. As the government explained in its briefs in opposition (at 15) in *Aleru* v. *Gonzales* (No. 04-670), and (at 20) in *Kebede* v. *Gonzales* (No. 04-280), the Board has altered its practices and has determined that in cases where the IJ's decision rests on both reviewable and nonreviewable grounds for denying relief from removal, AWO procedures should not be applied.

[3] The Sixth and Seventh Circuits have assumed, without deciding the question, that they have jurisdiction to review the Board's decision to apply its AWO procedure; but those courts have recognized that their review of the AWO decision, if it is separately reviewable, would generally merge with review of the merits. See *Denko* v. *INS*, 351 F.3d

Separate review would only be necessary, according to the Third Circuit in *Smriko*, in situations like those addressed in *Zhu* and *Haoud*, see *Smriko*, 387 F.3d at 296-297, or situations that otherwise have a "material impact on a court's exercise of its judicial review function," *id.* at 296. The Third Circuit concluded that the circumstances in *Smriko* fell into the latter category because the IJ had failed adequately to address the novel and difficult issue of statutory interpretation raised by the petition and there was no Board interpretation of the statute, and the court thus would be "left to interpret the statute without the [Board] having provided its *Chevron* deference-entitled 'concrete meaning' to an ambiguous statute." *Id.* at 297; see *id.* at 289. The court sought to avoid "building case law that is fashioned without the benefit of agency expertise" and "usurping the role of the [Board] and establishing a precedent that the Board's expertise might counsel against." *Id.* at 297; see *Chong Shin Chen*, 378 F.3d at 1088 (although in most cases merits review of IJ's decision and review of Board's AWO decision would collapse into one analysis, remand for the Board to consider an issue "in the first instance" is warranted when the court is "confronted with a novel legal issue"). Cf. *Haoud*, 350 F.3d at 207 (IJ had not been able to consider seemingly applicable Board precedent that postdated IJ's decision).

Unlike the Third Circuit in *Smriko*, the court of appeals below did not confront a situation in which the Board had failed to interpret an ambiguous statutory term and the court thus would be left to construe the statute in the first

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717, 732 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003). The Fourth Circuit has concluded that the proper remedy for an erroneous AWO decision is judicial review of the merits by the court of appeals to correct the error. See *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 281 (4th Cir. 2004).

instance. Rather, the court of appeals explained that the Board had interpreted the term "child abuse" to encompass "any form of cruelty to a child's physical, moral, or mental well-being." Pet. App. 5a. The court then reviewed the IJ's decision to examine whether petitioner's crime fit within that definition. *Id.* at 5a-6a. Nothing in the Third Circuit's decision in *Smriko* suggests that that court, if faced with comparable circumstances in which the Board had interpreted the relevant statutory term, would nonetheless review the Board's determination to apply its AWO procedure.[4]

Finally, petitioner errs in arguing (Pet. 28) that the court of appeals "assume[d] that it must give *Chevron* deference to IJ opinions affirmed by AWO orders." The court of appeals did not accord deference to the IJ's interpretation of the term "child abuse." Rather, the court determined that the Board had previously construed that term, deferred to the *Board*'s interpretation, and assumed that the IJ had applied the Board's construction. See Pet. App. 4a-5a. This case therefore raises no questions concerning whether, when reviewing an IJ decision in a case in which the Board applied its AWO procedure, a court should accord deference to the IJ's interpretation of an ambiguous statutory term. See Pet. 11, 28.

2. Petitioner contends (Pet. 29-30) that his crime did not amount to "any form of cruelty to a child's physical, moral or mental well-being," and therefore did not amount to "child abuse" so as to render him ineligible for cancellation

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[4] Because the court of appeals concluded that the Board had interpreted the statutory term "child abuse," the court, contrary to petitioner's suggestion (Pet. 28), did not infringe any "remand rule" (see, *e.g.*, *INS* v. *Ventura*, 537 U.S. 12 (2002)) by interpreting the statute in the first instance instead of remanding to permit the agency initially to construe the statute.

of removal. That fact-bound contention does not warrant review.

Even if, as petitioner contends, the offense of malicious punishment of a child under Minnesota law encompasses both conduct amounting to child abuse and conduct that fails to amount to "cruelty to a child's physical, moral or mental well-being," the court of appeals determined that petitioner's crime amounted to child abuse based on an examination of the criminal complaint against petitioner and of petitioner's statements during his guilty plea hearing. Pet. App. 6a. As the court explained, "the complaint alleged that [petitioner] repeatedly struck his stepson on the back and legs with the electrical cord from an iron," petitioner "admitted as much during his plea hearing," and the complaint further alleged that petitioner's stepson "suffered physical injuries, including two long, red, circular marks, and a large bruise on his thigh." *Ibid.* (internal quotation marks omitted). There is no warrant for reviewing the court of appeals' fact-specific determination that, in those circumstances, petitioner's crime qualifies as a crime of child abuse.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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