No. 06-1369

In the Supreme Court of the United States

EUSEBIO GUEVARA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, when an immigration judge (IJ) finds an alien removable but grants discretionary relief from removal, the Board of Immigration Appeals has the authority to order the alien removed upon overturning the IJ's grant of discretionary relief.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 472 F.3d 972. The decisions of the immigration judge (Pet. App. 12a-20a) and the Board of Immigration Appeals (Pet. App. 9a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2007. The petition for a writ of certiorari was filed on April 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for removal of an alien from the United States upon entry of an order of removal. See 8 U.S.C. 1227(a) (2000 & Supp. V 2005);

8 U.S.C. 1231(a). The INA defines an "order of deportation"—now an "order of removal"—as follows:

> (A) The term "order of deportation" means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation.
>
> (B) The order described under subparagraph (A) shall become final upon the earlier of—
>
> (i) a determination by the Board of Immigration Appeals affirming such order; or
>
> (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals.

8 U.S.C. 1101(a)(47).[1]

2. Petitioner is a native and citizen of Honduras who first came to the United States in 1985 and became a lawful permanent resident in 1990. Pet. App. 1a. On July 9, 1991, petitioner was convicted of retail theft, in violation of California law, for which he was sentenced to one day in jail and three years of probation. *Id.* at 9a-10a. On November 27, 1996, petitioner was convicted of

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[1] The term "special inquiry officer" refers to an immigration judge. See 8 C.F.R. 1.1(*l*) (1996). Because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, "did away with the previous legal distinction among deportation, removal, and exclusion proceedings," *United States* v. *Pantin*, 155 F.3d 91, 92 (2d Cir. 1998), the term "order of removal" includes statutory references to "order of deportation" and "order of exclusion," see *id.* at 93.

two counts of fourth-degree sexual assault, in violation of Wisconsin law, for which he was sentenced to 63 days of imprisonment and eighteen months of probation. *Id.* at 1a.

When petitioner re-entered the United States in June 2004 after a visit to Honduras, he was placed in removal proceedings and was charged with being inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) as an alien convicted of a crime involving moral turpitude. Pet. App. 1a. Petitioner contested removability, denying that he had been convicted of the two previous offenses, and he also applied for a discretionary waiver of inadmissibility under former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994). Pet. App. 1a-2a, 13a.[2]

3. The immigration judge (IJ) found petitioner removable and granted him discretionary relief from removal. The IJ first determined that petitioner was removable because he had been convicted of the offenses

[2] Under former Section 212(c), a permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" could apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 289, 295 (2001). The applicant for relief bore the burden of demonstrating that his application merited favorable consideration. *In re Marin*, 16 I. & N. Dec. 581, 583-585 (B.I.A. 1978). When considering a Section 212(c) application, an IJ "must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country." *Id.* at 584. In IIRIRA, Congress repealed 8 U.S.C. 1182(c) (1994), and replaced it with 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. See Pub. L. No. 104-208, Div. C, § 304, 110 Stat. 3009-594, 3009-597. Relief under former Section 212(c) nonetheless remains available for aliens, such as petitioner, whose convictions were obtained through a plea agreement and who would have been eligible for relief under the law then in effect. See *St. Cyr*, 533 U.S. at 314-326.

specified in his notice to appear and because the sexual assault conviction was a crime involving moral turpitude. Pet. App. 13a-14a. The IJ then determined that petitioner was eligible for a waiver of inadmissibility, *id.* at 14a-15a, and that he merited such a waiver as a matter of discretion, *id.* at 15a-20a. The IJ noted that petitioner's sexual assault crime was "serious" because it involved abusing his girlfriend's young daughter and because petitioner still "denies that he ever touched the child" even though he pleaded guilty, and as a result, petitioner would have to "show equities which rise to a fairly significant level in order to merit the granting of relief." *Id.* at 16a, 18a. But the IJ found positive factors sufficient to merit granting relief, including the "duration of [petitioner's] presence in the United States," his employment history, the financial support he provides to his wife and children in Honduras, "how difficult the situation for finding employment is in Honduras," and petitioner's rehabilitation, which was evidenced by the fact that he "has not been convicted of any crime since 1996." *Id.* at 18a-19a.

The Board of Immigration Appeals (BIA) sustained the government's appeal of the IJ's grant of relief from removal. Pet. App. 9a-11a. The BIA determined that "the immigration judge sufficiently set forth the positive and negative factors presented in this case," but "upon weighing those factors," the BIA determined that petitioner "d[id] not merit a discretionary grant of a section 212(c) waiver." *Id.* at 11a. The BIA "acknowledge[d]" positive factors such as "the difficult conditions in Honduras, [petitioner's] long residence in the United States, his employment history, and the financial support he provides his family," but it viewed rehabilitation as a "neutral factor" because, although petitioner's sexual

assault conviction was nine years old, the offense is serious and petitioner failed to "acknowledge his wrongdoing." *Ibid.* The BIA then ordered petitioner removed to Honduras. *Ibid*.

4. The court of appeals denied the petition for review. Pet. App. 1a-8a. It first rejected petitioner's contention that the BIA failed to defer sufficiently to the IJ's factual finding concerning petitioner's rehabilitation. *Id.* at 6a. The court of appeals explained that the BIA did not overturn any factual findings but instead permissibly "reweighed the positive and negative factors and concluded that rehabilitation was a neutral factor" as a matter of the exercise of discretion. *Id.* at 6a.

The court then rejected petitioner's contention that the BIA had exceeded its authority by ordering him removed rather than remanding to the IJ to enter such an order. Pet. App. 6a-8a. Petitioner had argued, based on the Ninth Circuit's now-overruled decision in *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937, 940-941 (9th Cir. 2004), overruled by *Lolong* v. *Gonzales*, 484 F.3d 1173, 1176-1178 (9th Cir. 2007) (en banc), that only IJs have the authority to order an alien removed. Pet. App. 7a. The court of appeals rejected that argument, agreeing with the other courts of appeals that had held that the BIA may order removal after it reverses a grant of discretionary relief when the IJ has already found the alien removable. *Ibid.* (citing *Lazo* v. *Gonzales*, 462 F.3d 53, 54-55 (2d Cir. 2006), cert. denied, 127 S. Ct. 2909 (2007); *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 600-601 (5th Cir. 2006); and *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006)).

The court of appeals explained that "the conclusion that the BIA has the authority to enter the order it did * * * flows from" the statutory definition of "order

of deportation," because an "order of deportation" includes both an IJ's order "'*concluding that the alien is deportable*'" and one "'ordering deportation.'" Pet. App. 7a (quoting 8 U.S.C. 1101(a)(47)(A)). Accordingly, the IJ's initial order that petitioner was removable (deportable) was an "order of deportation," even though the IJ went on to grant petitioner relief from removal as a matter of discretion. *Id.* at 8a. Moreover, the court noted, an "order of deportation" becomes final "upon the earlier of a determination by the Board of Immigration Appeals affirming such order" or the expiration of the time to appeal to the BIA, *id.* at 7a (quoting 8 U.S.C. 1101(a)(47)(B)). Thus, the court concluded, "if an IJ decides that an alien is removable but does not ultimately order removal due to a grant of a waiver, cancellation, or the like, the decision that the alien is removable is nonetheless an 'order of deportation' that may be affirmed by the BIA." *Id.* at 7a-8a. In sum, the court explained, the IJ's finding that petitioner was removable based on his crime involving moral turpitude "constituted an order of deportation (i.e., removal) that could be given effect by the BIA once it reversed the IJ's subsequent conclusion that [petitioner] was entitled to a discretionary waiver of removal." *Id.* at 8a.

ARGUMENT

Petitioner seeks review of the now-uniform rule in the courts of appeals that the BIA may order deportation when an IJ has previously determined that an alien is removable but granted relief from removal and the BIA reverses the IJ's grant of relief from removal. This Court recently denied review of that question, see *Lazo* v. *Gonzales*, 462 F.3d 53 (2d Cir. 2006), cert. denied, 127

S. Ct. 2909 (2007), and there is no reason for a different disposition here.

1. Petitioner contends (Pet. 11-29) that the BIA exceeded its authority in ordering him removed to Honduras rather than remanding his case to the IJ for entry of an order of removal. The court of appeals correctly rejected that argument. As the court of appeals explained, the INA defines an "order of deportation" as "the order of the [IJ] * * * concluding that the alien is deportable *or* ordering deportation." 8 U.S.C. 1101(a)(47)(A) (emphasis added); see Pet. App. 7a. In this case, the IJ found that petitioner was removable based on his crime of moral turpitude, but then granted relief from removal under former Section 212(c). *Id.* at 14a, 20a. The IJ's determination that petitioner was removable was an "order of deportation" within the meaning of Section 1101(a)(47)(A) because it "conclud[ed] that the alien is deportable." Pet. App. 7a (quoting 8 U.S.C. 1101(a)(47)(A) (emphasis omitted)).[3] When the BIA overturned the IJ's grant of discretionary relief, it "g[ave] effect" to "the IJ's first holding" of "removability" which the BIA had left "intact." *Id.* at 8a. The BIA was not required to remand for an entry of order of removal because it could (and did) order removal based on the order the IJ had already entered. *Id.* at 7a-8a. The decision below is compelled by the plain language of

[3] Contrary to petitioner's suggestion (Pet. 23), the court of appeals did not impermissibly "equate[] a finding of removability with an order of deportation." The court of appeals relied on the plain language of Section 1101(a)(47)(A), which defines an "order of deportation" as including *both* an order "concluding that the alien is deportable" *and* one "ordering deportation." Pet. App. 7a-8a. The various statutory and regulatory provisions that petitioner cites to distinguish between the two (Pet. 23-24) are therefore inapposite.

the statute. It also is consistent with common sense. It is the norm in administrative practice that the appellate body in an agency renders the dispositive decision in a matter if an appeal has been taken to that body. And it would be a waste of time and resources—and would delay the expeditious removal of aliens who have been found to have no grounds for remaining in the United States—if the BIA were required to remand the case to the IJ for the formality of entering an order of removal.

Petitioner contends that the conclusion of the court below "cannot be squared with the statutory and regulatory scheme" because "[t]he BIA * * * has no legitimate authority in that scheme to enter an order of deportation in the first instance." Pet. 12. But, as the court of appeals explained, the IJ's "threshold determination" that petitioner was removable itself was an "order of deportation" under Section 1101(a)(47)(A), to which the BIA simply "g[ave] effect," Pet. App. 8a; the BIA did not order deportation "in the first instance." Contrary to petitioner's suggestion (Pet. 20), there is no question raised in this case about whether the BIA itself may issue an order of deportation in the first instance when an IJ fails to do so.

Nor does the decision below raise a "crucial question of institutional competence." Pet. 21. The court of appeals did not dispute that IJs are statutorily authorized to "decide whether an alien is removable from the United States" in the first instance. 8 U.S.C. 1229a(c)(1)(A); see 8 C.F.R. 1240.1(a)(i), 1240.12. And the BIA acted well within its role as an appellate body when it reversed the IJ's grant of discretionary relief and ordered removal based on the IJ's determination that petitioner was removable. See, *e.g.*, *Lazo*, 462 F.3d at 54 ("The BIA's power to review and overturn the

IJ's grant of discretionary relief is unchallenged."). The court of appeals' decision is thus fully consistent with the statutory scheme.

2. Petitioner contends (Pet. 11) that there is an "entrenched and persistent split among the Courts of Appeals" on the question presented. There is no conflict in the circuits warranting review. Although the Ninth Circuit had previously issued a decision supporting petitioner's view, the circuit has revisited the issue en banc, overruled the decision on which petitioner relies, and eliminated any conflict in the circuits.

In addition to the court of appeals below, all five of the other courts of appeals that have addressed the issue have held that the BIA may order an alien removed if the IJ has found the alien removable but granted relief from removal and the BIA reverses the IJ's grant of relief, because the IJ's initial determination that the alien is removable qualifies as an order of removal under Section 1101(a)(47)(A). See *Lolong* v. *Gonzales*, 484 F.3d 1173, 1176-1178 (9th Cir. 2007) (en banc); *Sosa-Valenzuela* v. *Gonzales*, 483 F.3d 1140, 1146 (10th Cir. 2007); *Lazo* v. *Gonzales*, 462 F.3d 53, 54-55 (2d Cir. 2006), cert. denied, 127 S. Ct. 2909 (2007); *Delgado-Reynua* v. *Gonzales*, 450 F.3d 596, 600-601 (5th Cir. 2006); *Solano-Chicas* v. *Gonzales*, 440 F.3d 1050, 1054 (8th Cir. 2006). And yet another court of appeals has assumed that the BIA may order removal under those circumstances. See *Del Pilar* v. *United States Att'y Gen.*, 326 F.3d 1154, 1156 (11th Cir. 2003).

As petitioner explains (Pet. 14-16), the Ninth Circuit initially held to the contrary in *Molina-Camacho* v. *Ashcroft*, 393 F.3d 937, 940 (2004). That decision, which was the first court of appeals decision to consider the issue, did not discuss whether the definition of "order of

removal" in Section 1101(a)(47)(A) encompasses an order finding that an alien is removable. See *id.* at 941 ("There is no statutory authority * * * that supports the assertion that a finding that a petitioner is removable is the same thing as an order of removal."). Indeed, several courts of appeals expressly rejected the Ninth Circuit's holding because it failed to address the relevant statutory language. See, *e.g.*, *Lazo*, 462 F.3d at 55; *Sosa-Valenzuela*, 483 F.3d at 1146 n.10.

The Ninth Circuit then decided to revisit—and overrule—*Molina-Camacho*. In *Lolong* v. *Gonzales*, the en banc court of appeals explained that when an IJ finds an alien deportable and then grants relief, the initial determination "that the alien is deportable" "constitutes an 'order of deportation'" within the meaning of Section 1101(a)(47)(A). 484 F.3d at 1177. Thus, when "the BIA reverses an IJ's grant of relief * * * an order of deportation has already been properly entered by the IJ" and the BIA may "simply reinstate[] the order of removal that has already been entered by the IJ and that would have taken effect but for the IJ's subsequent cancellation of removal." *Ibid.* Rejecting its prior reasoning that to allow the BIA to order removal under those circumstances would "conflate[] the BIA's uncontested *substantive* power to reverse a finding of removability * * * with the *procedural* power to issue the order of removal that results from such a reversal," *Molina-Comacho*, 393 F.3d at 941, the court of appeals stated that "[r]einstating a prior order of removal by eliminating the impediment to that order's enforcement is entirely consistent with the BIA's appellate role," *Lolong*, 484 F.3d at 1177; see *id.* at 1178 ("[T]he BIA's actions were entirely within the scope of its powers under the INA.").

Thus, the uniform view of the courts of appeals is that the BIA had the authority to order removal in the circumstances of this case. *Lolong*, 484 F.3d at 1178. And, not surprisingly, the long-established practice of the BIA that the courts of appeals have sustained has not led to any of the "mass confusion" that petitioner claims would result. Pet. 25.

3. Even if the BIA were required to remand this case to the immigration judge to issue an order of removal, the outcome of this case would not be affected. The IJ found that petitioner was removable as charged, Pet. App. 13a-15a; the BIA did not disturb the filing, *id.* at 9a-11a; and petitioner does not challenge it here. Although petitioner has suggested that the BIA should be required to remand to an IJ after reversing a grant of relief from removal because "the IJ [may have] had several reasons for his decision to allow the alien to stay in America, yet only reached one," Pet. 22, petitioner himself applied for only one form of relief from removal. Accordingly, a decision by this Court will not affect petitioner's ultimate removal from the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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