AILF AMERICAN IMMIGRATION LAW FOUNDATION

February 14, 2002

Lori Scialabba
Acting Chairman
Board of Immigration Appeals
Executive Office for Immigration Review
U.S. Department of Justice
5107 Leesburg Pike, Ste. 2400
Falls Church, VA 22041

Re: Re-visiting and vacating Matter of Puente and Matter of Magallanes.

Dear Ms. Scialabba:

The undersigned respectfully urge the Board of Immigration Appeals ("Board") to revisit and vacate its precedent decisions Matter of Puente, Interim Decision 3412 (BIA 1999) (felony DUI is a crime of violence under 18 USC § 16(b) and thus an aggravated felony) and Matter of Magallanes, Interim Decision 3341 (BIA 1998) (same). Subsequent circuit court decisions correctly rejecting the rationale of Matter of Puente and Matter of Magallanes now govern immigration proceedings in a majority of immigration courts throughout the United States. To continue to apply these two decisions in the minority of immigration courts where they may remain in force creates precisely the kind of non-uniformity this Board and the Attorney General have labored to eliminate. It also unjustly punishes the unfortunate noncitizens whose proceedings are occurring in the minority of circuits where this Board precedent still applies. Please allow us to point out to the Board the following.

The United States Court of Appeals for the Fifth Circuit has held that a felony DUI is not a crime of violence under 18 USC § 16(b). United States v. Chapa-Garza, 243 F.3d 921 (5th Cir., March 1, 2001) (in the context of U.S. Sentencing Guideline § 2L1.2), petition for reh'g en banc denied, No. 99-51199 (Aug. 20, 2001). The Board has acknowledged that it must follow Chapa-Garza for all immigration proceedings that originate within the jurisdiction of the Fifth Circuit. Matter of Olivares, 23 I&N Dec. 148 (BIA, July 3, 2001). Counsel in Chapa-Garza has informed us that the Solicitor General has declined to ask the Supreme Court to review this case.

The United States Court of Appeals for the Seventh Circuit also has held that a felony DUI is not a crime of violence under 18 USC § 16(b). Bazan-Reyes v. INS, No 99-3861, 2001 WL 748157 (7th Cir., July 5, 2001) (in the context of immigration proceedings). Counsel in Bazan-Reyes has informed us that the Solicitor General has declined to ask the Supreme Court to review this case.

Shortly after the Seventh Circuit decided Bazan-Reyes, the United States Court of Appeals for the Second Circuit also held that a felony DUI is not a crime of violence under 18 USC § 16(b). Dalton v. Ashcroft, No. 00-4123, 2001 WL 822454 (2d Cir., July 20, 2001) (in the context of immigration proceedings). Counsel in Dalton has informed us that the Solicitor General has declined to ask the Supreme Court to review this case.

Several weeks after the Second Circuit handed down Dalton, the United States Court of Appeals for the Ninth Circuit determined that a felony DUI is not a crime of violence under 18 USC § 16(b). United States v. Trinidad-Aquino, No. 00-10013, 2001 WL 883719 (9th Cir., Aug. 8, 2001) (in the context of U.S. Sentencing Guideline § 2L1.2). Litigators in the 9th Circuit have informed us that the Solicitor General has declined to ask the Supreme Court to review this case.

Recently, the Ninth Circuit re-affirmed its holding in Trinidad-Aquino in the context of immigration law. Montiel-Barraza v. INS, No. 00-70784 (9th Cir., Jan. 16, 2002). We feel that it is unlikely that the Solicitor General will ask for review in Montiel-Barraza if he has already declined to do so in Trinidad-Aquino.

The Court of Appeals for the Third Circuit issued the seminal decision United States v. Parson, 955 F.2d 858 (3rd Cir.1992) (extensively quoted by the Chapa-Garza court, see Chapa-Garza, supra, at 243 F.3d 926). Therefore, the Third Circuit is likely to side with the Fifth, Seventh, Second, and Ninth Circuits.

Only the Tenth Circuit has deferred to the Board and its rationale in Matter of Puente. Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001). The remaining circuits, the First, Fourth, Sixth, Eighth and Eleventh Circuits and the District of Columbia, have not yet indicated how they will resolve this issue.

A very revealing way to view the significance of these rulings and the status of the law on this issue is to note the number of Immigration Judges who now must disregard Puente/Magallanes. By our calculation, approximately130 of the 196 Immigration Judges preside in circuit court jurisdictions where circuit court precedent runs counter to the Board's rationale in Puente/Magallanes. That is approximately 66% of the Immigration Judges. The 14 Immigration Judges in the Third Circuit (7%) probably will not follow the Board much longer. A distinct minority of 52 Immigration Judges, or 27%, remain bound by Puente/Magallanes, as of this writing.

We appreciate that the Board takes seriously its duty to create and maintain uniformity nationwide when interpreting and enforcing immigration laws. See. e.g., Matter of Crammond, 23 I&N Dec. 9 (BIA 2001) ("[i]mportant policy considerations favor applying a uniform federal standard in adjudicating removability and determining the immigration consequences of a conviction under the Act"), vacated for lack of jurisdiction, Matter of Crammond, 23 I&N Dec. 179 (BIA 2001). The Board is now obligated to disregard Matter of Puente and Matter of Magallanes in the majority of immigration cases which involve a felony DUI. For purposes of uniformity, and to avoid unfairly punishing a minority of aliens who might labor under the misfortune of being placed into proceedings in a circuit other than the Second, Third, Fifth, Seventh or Ninth, the Board must revisit and vacate Matter of Puente and Matter of Magallanes.

We bring to your attention a recent appeal to the Board from a hearing that fell within the jurisdiction of the 8th Circuit. In Matter of Ruben OLIVARES-Rodriguez, A41-935-199 - Omaha, (I.J. Jan. 3, 2002) the Respondent filed a Notice of Appeal (Form EOIR-26) on January 22, 2002) and has filed a Motion to Expedite Notice of Appeal. Mr. Olivares has a felony conviction in the State of Iowa for driving while intoxicated. The Immigration Judge applied Matter of Puente and Matter of Magallanes and ordered him removed. We ask that you consider designating this case a precedent decision and use it as the vehicle in which to vacate Matter of Puente and Matter of Magallanes. We repeat our offer to the Board to submit a brief as amici curiae on this issue, in conjunction with this case, or with any other case, which the Board might designate.

Yours truly,

Nadine Wettstein
Director, Legal Action Center
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March 13, 2002

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Dear Ms. Wettstein and Mr. Hutchins,

Thank you for your letter of February 14, 2002, in which you urge the Board to revisit *Matter of Puente*, Interim Decision 3412 (BIA 1999) (a felony driving under the influence offense is a crime of violence and thus an aggravated felony). I appreciate your thoughtful discussion of recent case law regarding DUI cases.

The Board is aware of recent federal court developments regarding this issue and is always willing to re-examine legal issues in the context of the cases that arise before us. In that regard, thank you for bringing a current appeal to our attention. We will consider it carefully, as we do other cases at the Board. You should know that there is a case currently under active consideration by the en banc Board that pertains to the issue of felony DUI cases.

Sincerely,

Lori Scialabba
Acting Chairman