[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13038
Non-Argument Calendar

Agency No. A206-239-540

ALEJANDRO ALARCON-VEGA,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(September 1, 2021)

Before JORDAN, BRANCH, and GRANT, Circuit Judges.

PER CURIAM:

Alejandro Alarcon-Vega, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") decision affirming the immigration judge's ("IJ") decision pretermitting his application for cancellation of removal because the IJ determined that Alarcon-Vega's prior Alabama conviction for solicitation of prostitution constitutes a crime involving moral turpitude ("CIMT"), thereby rendering him ineligible for cancellation of removal. On appeal, Alarcon-Vega argues that his prior offense of conviction is not a CIMT because Alabama's law prohibiting the solicitation of prostitution encompasses conduct in which there is no monetary transaction involved, which is not morally turpitudinous conduct. After careful consideration, we dismiss in part and deny in part the petition for review.[1]

I. Background

Alarcon-Vega entered the United States on an unknown date without being admitted or paroled. As relevant to this appeal, on August 20, 2013, Alarcon-Vega pleaded guilty in Alabama state court to soliciting prostitution, in violation of Ala.

[1] Alarcon-Vega argues that the IJ also erred in determining that his prior Alabama conviction for domestic violence in the third-degree qualified as a "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E)(i), which rendered him ineligible for cancellation of removal. However, because the BIA did not reach this issue, we lack jurisdiction to review this claim. *See Martinez v. U.S. Att'y Gen.*, 446 F.3d 1219, 1221 n.2 (11th Cir. 2006) (explaining that when the BIA does not address an IJ's alternative holding, the alternative holding is not subject to review by this Court). Accordingly, we dismiss this portion of Alarcon-Vega's petition.

Code § 13A-12-121(c). He was sentenced to 30 days' imprisonment and 24 months of probation.

On July 28, 2015, the Department of Homeland Security ("DHS") initiated removal proceedings against Alarcon-Vega by issuing him a notice to appear ("NTA"), charging him as removable under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien not admitted or paroled.[2] Alarcon-Vega admitted to the charge of entering the United States without inspection and applied for cancellation of removal under 8 U.S.C. § 1229b(b).[3]

At a master calendar hearing, DHS alerted the immigration court that Alarcon-Vega had a conviction for solicitation of prostitution, in violation of Ala. Code. § 13A-12-121(c),[4] which it asserted qualified as a CIMT and rendered

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[2] The NTA also charged Alarcon-Vega with removability under 8 U.S.C. § 1182(a)(2)(A)(i)(I) for being an alien convicted of a CIMT, but the IJ declined to rule on that allegation of removability.

[3] The Attorney General may cancel the removal of an inadmissible or removable alien and adjust the status of the alien to that of a lawful permanent resident if the alien:

> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
> (B) has been a person of good moral character during such period;
> (C) has not been convicted of an offense under [8 U.S.C. §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3)]; and
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1229b(b)(1).

[4] At the time of Alarcon-Vega's 2013 conviction, Alabama law provided that:

Alarcon-Vega ineligible for cancellation of removal. The IJ indicated that he would take the matter under advisement, and if he determined that Alarcon-Vega had committed a CIMT, he would issue an order pretermitting the application for cancellation of removal. Following the hearing, Alarcon-Vega's counsel filed a memorandum, arguing that because there was no precedent from this Circuit indicating that solicitation of prostitution was a CIMT, Alarcon-Vega was eligible for cancellation of removal (although he acknowledged that such precedent existed in other circuits).

Thereafter, the IJ entered an order pretermitting and denying Alarcon-Vega's application for cancellation of removal on the ground that he was statutorily ineligible because his Alabama conviction for soliciting prostitution qualified as a CIMT. The IJ explained that, under 8 U.S.C. §§ 1182(a)(2) and 1229b(b)(1) an alien convicted of a CIMT is statutorily ineligible for cancellation of removal, and in order to determine whether a prior offense was a CIMT, the immigration court would apply the categorical approach and compare the elements of the offense of conviction with "the elements of the generic definition of a

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> No person shall agree to engage in sexual intercourse, deviant sexual intercourse, or sexual contact with another or participate in the act for monetary consideration or other thing of marketable value and give or accept monetary consideration or other thing of value in furtherance of the agreement.

Ala. Code § 13A-12-121(c) (2001). In 2019, the statute was amended and the term "sodomy" was substituted for "deviant sexual intercourse." *Id.* (2020).

CIMT." The IJ noted that historically the BIA viewed prostitution-related crimes as involving moral turpitude, and that the Tenth, Sixth, and Ninth Circuits had held that solicitation of prostitution was a CIMT. Therefore, the IJ found that Alarcon-Vega's Alabama conviction for solicitation of prostitution qualified as a CIMT and rendered him statutorily ineligible for cancellation of removal. Accordingly, the IJ denied the application and ordered Alarcon-Vega removed to Mexico.[5]

Alarcon-Vega, through counsel, appealed the IJ's decision to the BIA, arguing, in relevant part, that the IJ erred in determining that a conviction under Alabama law for solicitation of prostitution was a disqualifying CIMT. He argued for the first time that the Alabama statute criminalized consensual sexual intercourse that did not involve a monetary transaction, and therefore his conviction did not categorically qualify as a CIMT because the Alabama statute was divisible and overly broad.

The BIA affirmed the IJ's decision that Alarcon-Vega's solicitation of prostitution offense categorically qualified as a CIMT. It noted that both it and several of our sister circuits had held that prostitution-related offenses were CIMTs. Applying the categorical approach to Ala. Code § 13A-12-121(c), the

[5] The IJ also determined that Alarcon-Vega was statutorily ineligible for cancellation of removal because his Alabama domestic violence conviction was a disqualifying crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i). Alarcon-Vega challenged this determination in his subsequent appeal to the BIA, but the BIA concluded it did not need to reach the issue because of its ruling concerning the solicitation of prostitution conviction.

BIA rejected Alarcon-Vega's argument that the statute criminalizes all sexual activity in Alabama and instead concluded that it criminalized only sexual engagements that involved a monetary transaction, which involved moral turpitude. The BIA also held that, to the extent Alarcon-Vega argued that there was a realistic probability that Alabama would apply § 13A-12-121(c) to conduct that falls outside of the generic definition of a CIMT, his argument was unpersuasive because he failed to identify any case in which Alabama had done so. Accordingly, the BIA affirmed the denial of Alarcon-Vega's application for cancellation of removal on this ground. Alarcon-Vega now petitions this Court for review.

II. Discussion

Alarcon-Vega argues that the IJ and the BIA erred in determining that his Alabama conviction for solicitation of prostitution categorically qualified as a CIMT that renders him statutorily ineligible for cancellation of removal. He maintains that Ala. Code § 13A-12-121(c) criminalizes all sexual activity, including such activity that does not involve a monetary transaction, and therefore, punishes conduct that falls outside the definition of a CIMT.

"We review our subject-matter jurisdiction de novo." *Xiu Ying Wu v. U.S. Att'y Gen.*, 712 F.3d 486, 492 (11th Cir. 2013). When, as here, an alien asks us to review the denial of an application for cancellation of removal, we have

jurisdiction to review only constitutional claims or questions of law. *See* 8 U.S.C. § 1252(a)(2)(B)(i), (D). Whether a prior offense of conviction qualifies as a CIMT is a question of law that we review *de novo*, "subject to the principles of deference articulated in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)." *Pierre v. U.S. Att'y Gen.*, 879 F.3d 1241, 1249 (11th Cir. 2018); *see also Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1240 (11th Cir. 2016). We review only the decision of the BIA, except to the extent that it adopts the IJ's decision or expressly agrees with the IJ's reasoning. *Gonzalez v. U.S. Att'y Gen.*, 820 F.3d 399, 403 (11th Cir. 2016).

An alien convicted of a CIMT is inadmissible and statutorily ineligible for cancellation of removal. *See* 8 U.S.C. § 1229b(b)(1) (explaining that in order to be eligible for cancellation of removal, the alien must show that he: (1) "has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of [an] application"; (2) "has been a person of good moral character during [that] period"; (3) has not been convicted of certain criminal offenses, including a CIMT under 8 U.S.C. § 1182(a)(2)(A)(i)(I); and (4) "establishes that removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence"). "Although the term 'moral turpitude' is not defined by statute, [we] ha[ve] held that it involves an act of

baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Gelin*, 837 F.3d at 1240 (quotation omitted).

To determine whether a state offense is a CIMT, we apply the categorical approach, looking "to the statutory definition of the crime rather than the underlying facts of the conviction." *Cano v. U.S. Atty. Gen.*, 709 F.3d 1052, 1053 (11th Cir. 2013). Under the categorical approach, we ask "whether the least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude." *Id.* at 1053 n.3 (quotation omitted).

When Alarcon-Vega was convicted, the relevant statute provided as follows:

> [n]o person shall agree to engage in sexual intercourse, deviant sexual intercourse, or sexual contact with another or participate in the act for monetary consideration or other thing of marketable value and give or accept monetary consideration or other thing of value in furtherance of the agreement.

Ala. Code § 13A-12-121(c). Thus, under a plain reading of the statute, the least culpable conduct necessary to sustain a conviction under Ala. Code § 13A-12-121(c) requires: (1) agreeing to engage in sexual contact with another; (2) for monetary or other valuable consideration; and (3) giving or accepting the agreed-upon consideration in furtherance of the agreement. We have no trouble

concluding that agreeing to engage in sexual contact for consideration—monetary or otherwise—"involves an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Gelin*, 837 F.3d at 1240; *see also Cano*, 709 F.3d at 1054 (characterizing a CIMT as an offense involving "conduct that exhibits a disregard for the law" and "a violation of the accepted rules of morality and the duties owed to society" (alteration adopted) (quoting *Matter of Danesh*, 19 I. & N. Dec. 669, 671 (BIA 1988))). Accordingly, we hold that a conviction for violating § 13A-12-121(c) categorically qualifies as a CMT.[6]

Furthermore, we note that our conclusion is consistent with that of other circuits that have addressed similar statutes. *See, e.g.*, *Reyes v. Lynch*, 835 F.3d 556, 558, 560 (6th Cir. 2016) (holding that an Ohio conviction for solicitation of prostitution qualified as a CIMT because, "[i]f the BIA considers prostitution to be a CIMT, there is no reason to consider the solicitation of prostitution to be significantly less 'base, vile, and depraved' than the act of prostitution itself" (quotation omitted)); *Gomez-Gutierrez v. Lynch*, 811 F.3d 1053, 1057–59 (8th Cir. 2016) (holding that a Minnesota conviction for soliciting prostitution categorically

[6] Because we conclude that the least culpable conduct under the statute categorically qualifies as a CIMT, we need not reach the issue of whether the statute is divisible. *See Gelin*, 837 F.3d at 1242.

qualified as a CIMT); *Rohit v. Holder*, 670 F.3d 1085, 1087, 1089–90 (9th Cir. 2012) (holding that a California conviction for disorderly conduct involving solicitation of prostitution categorically qualified as a CIMT because "soliciting an act of prostitution is not significantly less 'base, vile, and depraved' than engaging in an act of prostitution").

Although Alarcon-Vega argues that § 13A-12-121(c) criminalizes consensual sexual intercourse without any exchange of consideration, he has failed to meet his burden of demonstrating that the "statute creates a crime outside the categorical definition." *Pierre*, 879 F.3d at 1252. In order to meet this burden, Alarcon-Vega "must show a realistic probability, not a theoretical possibility, that the State would apply its statute to the nongeneric conduct." *Id.* (quotation omitted). To establish such a realistic probability, he "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* As the BIA noted, Alarcon-Vega pointed to no instance in which Alabama has prosecuted a person under § 13A-12-121(c) "for any conduct that falls outside of the CIMT definition."

Accordingly, we deny his petition for review.

PETITION DISMISSED IN PART AND DENIED IN PART.

JORDAN, Circuit Judge, concurring.

I concur in the judgment.