MAYER BROWN'S PENDING MATTERS IN THE U.S. SUPREME COURT

As of May 15, 2012

GRANTED CASES

No.	Caption and Status	Attorneys	Description
11-182	*Arizona v. United States* Argument held on 4/25/12	A. Pincus C. Rothfeld	The question presented in this case is whether the federal immigration laws impliedly preempt an Arizona statute that, among other things, (1) criminalizes as a matter of state law the status of being unlawfully present in the United States and failing to register with the federal government; (2) criminalizes as a matter of state law working while not being authorized to do so; (3) requires all State and local law enforcement officers to verify with federal authorities the immigration status of virtually everyone that they stop or arrest in the course of their day-to-day policing activities; and (4) authorizes the warrantless arrest of aliens believed to be removable. In conjunction with the Yale Supreme Court Clinic, we filed an *amicus* brief on behalf of state and local law enforcement officials in support of the United States urging that the Arizona statute be struck down.
11-159	*Astrue v. Capato* Argument held on 3/19/12	A. Pincus C. Rothfeld M. Kimberly P. Hughes	The Social Security Act allows certain categories of children to receive a survivor's benefit following the death of a "fully or currently insured individual." 42 U.S.C. § 402(d)(1). To qualify for child-survivorship benefits under § 402(d)(1), the applicant must be a child, "as defined in § 416(e)," of the insured individual. Section 416(e), in turn, defines "child" broadly to include the "child or legally adopted child," the "stepchild," or, under limited circumstances, the "grandchild" of the "individual." Here, the Third Circuit concluded (in conformity with the Ninth, but in conflict with the Fourth and Eighth Circuits) that an individual's posthumously-conceived biological offspring is not that individual's "child" within the meaning of § 402(d)(1). In conjunction with the Yale Supreme Court Clinic, we opposed certiorari and now represent Capato on the

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			merits. Charles Rothfeld argued the case.
11-394	*Clarksburg Nursing Home & Rehabilitation Center, Inc. v. Marchio* Reversed 2/21/12	A. Pincus A. Parasharami B. Wong	The Federal Arbitration Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This case arose from the West Virginia Supreme Court's refusal to enforce a pre-dispute arbitration agreement because, and only because, the plaintiff asserted a personal injury or wrongful death claim. We filed a petition for certiorari on behalf of Clarksburg Nursing Home & Rehabilitation Center, Inc. The Court summarily reversed the West Virginia court in a unanimous per curiam opinion, holding that the FAA preempts West Virginia court's *per se* public-policy rule because it categorically prohibits arbitration of a particular type of claim.
10-708	*First American Financial Corporation v. Edwards* Argument held on 11/28/11	D. Falk	The Real Estate Settlement Procedures Act of 1974 forbids kickbacks in connection with any real estate settlement service that involves a federally supported or federally sponsored mortgage. The Ninth Circuit held that a private purchaser of real estate settlement services may maintain an action under RESPA even if she cannot show that the technical violation of the statute alleged in any way affected the price, quality, or other characteristics of the real estate settlement services that she received. On behalf of the Association of Global Automakers and the Alliance of Automobile Manufacturers, we filed an *amicus* brief in support of petitioner arguing that persons who are unaffected by a bare violation of a legal duty lack Article III standing to sue.
10-1543	*Holder v. Sawyers* Argument held on 1/18/12	A. Pincus C. Rothfeld P. Hughes M. Kimberly	The Solicitor General filed a petition for certiorari, seeking to reverse the Ninth Circuit's determination that certain aliens may impute (*i.e.*, receive the immigration benefits of) the status of a parent with whom they have resided in the United States for purposes of eligibility for cancellation from removal. In conjunction

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			with the Yale Supreme Court Clinic, we opposed certiorari and now represent Sawyers on the merits.
10-1491	*Kiobel v. Royal Dutch Petroleum Co.* Argument held on 2/28/12 Re-argument ordered 3/5/12	A. Pincus M. Cohen A. Lakatos C. J. Summers	The question presented in this case is whether suits against corporations, as opposed to natural persons, for alleged violations of international law are cognizable under the Alien Tort Statute ("ATS"). The Second Circuit held that they are not. On behalf of the Clearing House Association LLC, we have filed an *amicus* brief in support of respondents advancing alternative grounds for affirmance. We argue that aiding-and-abetting claims are not cognizable under the ATS and that even if such claims were in principle cognizable, the plaintiff would have to prove both that the defendant intended to further the alleged primary violation of international law and that the defendant's actions substantially assisted the primary actor's violation. Following oral argument, the Court set the case for re-argument and directed the parties to file supplemental briefs addressing whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a foreign sovereign.
10-1150	*Mayo Collaborative Services (d/b/a Mayo Medical Labs.) v. Prometheus Labs.* Reversed 3/20/12	S. Shapiro T. Bishop	After we obtained a GVR in light of *Bilski*, the Federal Circuit reaffirmed its prior ruling that Prometheus's patents satisfy Section 101 under the "machine and transformation" test, even though the result is to preempt all uses of naturally occurring correlations between drug-metabolite levels and the effectiveness of the dose of the drug. The Court granted certiorari and reversed. The Court noted that the laws of nature recited by Prometheus's patent claims (*i.e.*, the relationships between concentrations of certain metabolites in the bloodstream and the likelihood that the drug dosage would be ineffective or cause harm) were not themselves patentable. It held that Prometheus's claimed processes were not patentable either because they simply appended onto the natural laws "well-understood, routine, conventional activity," and so did not provide

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			"assurance that the processes are genuine applications of those laws rather than drafting efforts designed to monopolize" the naturally occurring correlations. Steve Shapiro argued the case.
10-224	*National Meat Association v. Harris* Reversed 1/23/12	K. Geller B. Wong	The Federal Meat Inspection Act's express preemption provision provides that no State may impose "[r]equirements" with respect to the "premises, facilities and operations" of any federally inspected slaughterhouse that are "in addition to, or different than those" established by the federal government. 21 U.S.C. § 678. The Court reversed the decision below and held that the FMIA preempts a California statute that makes it illegal for a federally inspected slaughterhouse to, *inter alia*, "receive," "hold," "butcher," or otherwise "process" a non-ambulatory pig. Cal. Penal Code § 599f. We filed an *amicus* brief in support of petitioner on behalf of the Chamber of Commerce of the United States of America.
10-788	*Rehberg v. Paulk* Affirmed 4/2/12	A. Pincus C. Rothfeld M. Kimberly P. Hughes	The Court held that in this case that a government official who acts as a "complaining witness" by presenting perjured testimony before a grand jury is entitled to absolute immunity from a Section 1983 claim for civil damages. In conjunction with the Yale Law School Supreme Court Clinic, we represented Rehberg on the merits. Andy Pincus argued the case.
10-1472	*Taniguchi v. Kan Pacific Saipan* Argument held on 2/21/12	D. Himmelfarb P. Hughes M. Kimberly	The question presented is whether "compensation of interpreters," a taxable cost under 28 U.S.C. § 1920(6), includes compensation of those who translate written as well as spoken words. We opposed certiorari and now represent Kan Pacific Saipan on the merits. Dan Himmelfarb argued the case.
10-1259	*United States v. Jones* Affirmed 1/23/12	A. Pincus C. Rothfeld	The question presented was whether the warrantless use of a GPS tracking device on a vehicle to continuously monitor and record its movements on public streets violates the Fourth Amendment. On behalf of a diverse group of *amici*, including the Electronic Frontier Foundation and one of the principal inventors of the satellite

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			navigation technology on which GPS is based, and in conjunction with the Yale Law School Supreme Court Clinic, we filed an amicus brief in support of respondent. The Court affirmed and concluded that the government's attachment of the tracking device to the vehicle and its use of that device to monitor the vehicle's movements together constituted a search under the Fourth Amendment

CERT. PETITIONS AND APPEALS

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11-1085	*Amgen Inc. v. Conn. Retirement Plans & Trust Funds* Cert. petition filed 3/1/12 Amicus brief filed 4/4/12 Response filed 5/11/12	T. Bishop J. Yount D. Berger	Under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), a securities-fraud plaintiff must show at the class-certification stage that the essential predicates for the fraud-on-the-market theory are satisfied in order to invoke the presumption that all purchasers and sellers of the stock relied on the integrity of its market price as incorporating all available, material information about the stock. The Ninth Circuit held that a plaintiff need not show that an alleged misrepresentation is material in order to obtain class certification of a securities-fraud claim. Like the Seventh Circuit (but unlike the Second and Fifth Circuits), the Ninth Circuit held that materiality is solely a merits question and irrelevant at the class-certification stage. We filed an *amicus* brief on behalf of finance professors and former SEC commissioners and officials urging that the Court grant certiorari to resolve this circuit split.
11-363	*Amgen v. State of New York* Cert. petition filed 9/19/11 Voluntarily dismissed 12/12/12	K. Geller M. Odorizzi	There is no dispute that a claimant who expressly certifies compliance with a regulatory or legal obligation—*e.g.*, with federal and state anti-kickback laws—in order to get a claim paid, knowing that the certification is false, is subject to liability under the False Claims Act. This case presents the question whether and under what circumstances the mere submission of a claim *without* any explicit certification can nevertheless be deemed an implied certification of compliance. Three courts of appeals have rejected the concept of implied certification altogether, while four others have held that certification can be implied, but only when the legal obligations in question have been explicitly made a condition of payment. In this case, the First Circuit went even further and held that compliance could be deemed a "condition of payment" even though compliance was not actually *required* to get a claim paid so long as the government *could have* chosen, but was not required, to deny the claim had it been aware of the violation. We filed a petition for certiorari on behalf of Amgen, Inc.

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11-451	*Connecticut v. Lenarz* Cert. denied 1/17/12	A. Pincus C. Rothfeld P. Hughes M. Kimberly	The Connecticut Supreme Court held that when a prosecutor obtains privileged attorney-client communications that disclose the defendant's trial strategy, the defendant is presumptively deprived of his or her Sixth Amendment right to the effective assistance of counsel, regardless of whether the prosecutor's invasion of the attorney-client privilege was intentional. The court also held that dismissal of the charges against the defendant is presumptively the appropriate sanction under such circumstances. Retained by the defendant in conjunction with the Yale Supreme Court Clinic, we successfully opposed the State's petition for a writ of certiorari.
11-369	*DiGuglielmo v. New York* Cert. denied 11/7/11	C. Houpt A. Grawert S. Noveck	After pointing a gun directly at the alleged victim (who was striking petitioner's father with a baseball bat) and shooting him, petitioner was convicted of depraved indifference murder. He was acquitted of intentional murder. Subsequent to his conviction, New York courts reinterpreted the depraved indifference statute so as not to apply when the homicide was intentional. We filed a petition for certiorari, arguing that under those circumstances, due process requires that New York apply that change retroactively to cases on collateral review.
11-235	*Faulkner v. United States* Cert. denied 11/28/11	A. Pincus C. Rothfeld P. Hughes M. Kimberly	In conjunction with the Yale Supreme Court Clinic, we prepared a petition for certiorari on behalf of James Antoine Faulkner, who was convicted of three counts of distributing heroin and cocaine and one count of "conspiracy to contribute to the death of a third party" after a customer overdosed on drugs sold by one of Faulkner's partners. He was sentenced to 20 years on the drug charges and life in prison on the conspiracy charge. The only evidence connecting Faulkner to the supposed conspiracy was obtained after officers discovered an arrest warrant during an admittedly unconstitutional traffic stop. Our petition argued that the discovery of an outstanding arrest warrant during an unconstitutional encounter does not dissipate the taint of the unconstitutionality and thus requires the suppression of any evidence found in a search incident to arrest. The lower courts are deeply divided on this question.

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10-10392	*Krieger v. United States* Cert. denied 10/3/11	M. Nemetz	Jennifer Lynn Krieger pleaded guilty to simple distribution of fentanyl and was sentenced to a mandatory minimum sentence of 20 years in prison based on the trial judge's subsequent finding, by a preponderance of the evidence, that "death resulted" from use of the fentanyl. The Stanford Law School Supreme Court Litigation Clinic has filed a petition for certiorari on behalf of Krieger, contending that the "death resulting" factor should have been treated as an element of an aggravated offense that must be proven to a jury beyond a reasonable doubt, instead of as a sentencing factor that need only be proven to a judge by a preponderance of the evidence. We filed an amicus brief on behalf of the National Association of Criminal Defense Lawyers in support of the petitioner.
11-1027	*Latif v. Obama* Distributed for 5/17/12 conference	J. Schroeder G. Isaac C. Clamage M. McDonnell	Adnan Farhan Abd Al Latif, a Yemeni citizen, has been held at the Guantanamo Bay detention facility since January 2002. The district court granted his habeas petition, holding that the government's key piece of evidence was not sufficiently reliable to justify his continued detention. The D.C. Circuit reversed, holding that all government evidence in Guantanamo-detainee cases must be accorded a "presumption of regularity" under which the petitioner has the burden of *disproving* that the Government's evidence is authentic, correctly translated, and otherwise reliable. We filed an amicus brief on behalf of 13 retired federal judges that argues that the D.C. Circuit's decision departs from the common-law model of habeas adjudication and undermines the Supreme Court's decision in *Boumediene*.
10-1534	*McReynolds v. Merrill Lynch* Cert. denied 10/3/11	S. Shapiro T. Bishop S. Kane	Plaintiffs in this Title VII race-discrimination suit purport to represent a class of 700 African-American financial advisors employed by Merrill Lynch over the last decade in hundreds of offices across the country. Plaintiffs seek review of the Seventh Circuit's denial of their Rule 23(f) petition for leave to appeal from the district court's denial of class certification. We filed a brief in opposition.

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11-881	*Merrifield v. Board of County Commissions for the County of Santa Fe* Cert. denied 4/23/12	A. Pincus C. Rothfeld M. Kimberly P. Hughes	Public employees are generally protected against adverse employment actions taken in retaliation for exercising their First Amendment rights. With respect to First Amendment retaliation claims arising under the Speech and Petition Clauses, an employee must demonstrate that his speech addressed a "matter of public concern" before he is entitled to relief. The circuits are in conflict, however, over whether an employee whose First Amendment claim arises under the Association Clause also must demonstrate that the association touches a matter of public concern. In this case, Billy Merrifield was told that if he hired a lawyer in connection with an employment dispute, he would be fired. He did, and he was. The Tenth Circuit denied him relief on his retaliation claim, however, because it determined that his association with a lawyer was not a matter of public concern. In conjunction with the Yale Supreme Court Clinic, we filed a petition for certiorari on behalf of the employee.
11-102	*National Petrochemical and Refiners Association v. Environmental Protection Agency* Cert. denied 11/7/11	D. Himmelfarb	The question presented in thus case was whether the court of appeals correctly concluded that the Energy Independence and Security Act of 2007 clearly authorized the EPA to promulgate a rule with retroactive effect. We successfully opposed certiorari on behalf of respondent National Biodiesel Board.
11-680	*Nielson v. Ketchum* Distributed for 5/17/12 conference	A. Pincus C. Rothfeld P. Hughes M. Kimberly	In this case, Britney Nielson brought suit in federal district court, contending that the adoption of her son violated relevant provisions of the Indian Child Welfare Act. The district court agreed, finding that her child qualified as an "Indian child" pursuant to the membership definitions provided by the Cherokee Nation. The Tenth Circuit concluded that the Cherokee Nation's tribal determinations inappropriately expanded the reach of the Act and thus reversed. In conjunction with the Yale Supreme Court Clinic, we filed a petition for certiorari on behalf of Nielson.

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11-347	*Northwest Environmental Defense Center v. Brown* CVSG'd 12/12/11	T. Bishop R. Bulger C. Clamage	The Ninth Circuit held that runoff from forest roads that is subsequently channeled before reaching navigable waters is subject to permitting under Section 402 of the Clean Water Act. The ruling is at odds with the 30-year practice of EPA and EPA's interpretation of its Silvicultural Rule. We filed a petition for certiorari on behalf of private forest products defendants and Tillamook County. The Court has issued an order requesting the views of the Solicitor General.
10-1298	*Peirce v. CSX Transp., Inc.* Cert. denied 10/3/11	E. Tager D. Himmelfarb	CSX sued three lawyers and a doctor under RICO for filing fraudulent asbestos claims against CSX. The district court dismissed the complaint as time-barred, but the Fourth Circuit reversed. The lawyers and the doctor petitioned for certiorari. We filed an opposition on behalf of CSX.
11-741	*Philip Morris USA Inc. v. Campbell* Cert. denied 3/26/12	A. Frey K. Geller L. Goldman H. Chanoine	This case is one of over 8,000 pending individual personal injury claims filed in the wake of the decision of the Florida Supreme Court in the *Engle* case, a sprawling class action against the major domestic cigarette manufacturers. When the Florida Supreme Court decertified the *Engle* class, it nevertheless upheld certain findings rendered by the class-action jury and stated that those findings should receive "res judicata" effect in follow-on cases brought by individual class members. The problem for the follow-on cases like this one is that there can be no assurance that the *Engle* jury's findings actually apply to the circumstances of any particular class member. In this case, the Florida First District Court of Appeal upheld a $3.5 million compensatory award. At trial, the plaintiff was not required to prove that the particular cigarettes that his wife had smoked were defective, what the defect was, or when those cigarettes had the defect. Instead, the trial court permitted Campbell to rely solely on the "res judicata" effect of the *Engle* findings. We have filed a petition for certiorari on behalf of Philip Morris. The question presented is whether the Due Process Clause prohibits application of issue preclusion to establish elements of a plaintiff's claims where it cannot be shown that the issues being given preclusive effect were actually decided in a prior

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			proceeding.
10-1295	*Ragbir v. Holder* Cert. denied 10/3/11	A. Pincus C. Rothfeld P. Hughes M. Kimberly	Ravidath Ragbir, a citizen of Trinidad and Tobago, was ordered deported by the Board of Immigration Appeals as an aggravated felon after his conviction of wire fraud. The BIA rejected Ragbir's contention that the government failed to show that his crime caused losses of more than $10,000 (the amount required to make the crime an aggravated felony for immigration-law purposes). While the case was on appeal, the Supreme Court set out new standards that the agency may consider in making that determination, but the Second Circuit refused to remand the matter to the BIA for its application of the new standard in the first instance. Instead, the Second Circuit made that determination itself and found deportation permissible. In conjunction with the Yale Supreme Court Clinic, we filed a petition for certiorari on behalf of Ravidath Ragbir.
11-557	*Renzi v. United States* Cert. denied 1/17/12	A. Pincus K. Kramer	Former Congressman Richard Renzi was convicted of extortion and other public-corruption offenses based on allegations that, while developing land-exchange legislation, he asked the proponents of the legislation to acquire a parcel of property owned by one of his former business partners in return for his support of the legislation. The government alleged that Congressman Renzi did not disclose, among other things, that his former business partner intended to use the proceeds from the sale of the property to repay a debt to him. The Ninth Circuit affirmed the conviction. It held that Congressman Renzi's discussions about the terms of the proposed land-exchange legislation were not legislative acts protected by the Speech or Debate Clause. It also held, in conflict with the D.C. Circuit, that the Speech or Debate Clause does not include a non-disclosure privilege that prevents agents of the Executive from obtaining legislative-act materials from a Member of Congress without consent. We filed a petition for certiorari on behalf of Congressman Renzi.

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11-649	*Rio Tinto PLC v. Sarei*	A. Pincus	This case presents a number of questions of regarding the interpretation and scope of the Alien Tort Statute ("ATS") that have divided the courts of appeals. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court held that the ATS conferred upon the federal courts jurisdiction to hear federal-common-law claims based on a narrow class of violations of international law that have achieved universal acceptance. What this means in practice is controversial and, in particular, courts have not agreed on whether corporations are subject to suit under the ATS, whether the ATS applies extraterritorially, whether aiding-and-abetting claims are cognizable under the ATS (and if so, what liability standard applies), and whether a plaintiff must exhaust remedies in the country in which the alleged misconduct occurred before bringing an ATS claim in the United States. We filed a *amicus* brief in support of certiorari on behalf of the Chamber of Commerce. The case is likely being held for *Kiobel*, which has been set for re-argument in the next Term.
11-206	*Salem v. Holder* Cert. denied 1/9/12	A. Pincus C. Rothfeld P. Hughes M. Kimberly	Jad George Salem, a lawful permanent resident, has been deemed removable from the United States. Salem sought cancellation of removal, but was denied this relief on the basis of a Virginia conviction for having taken $23 worth of gasoline without paying for it. The Fourth Circuit, agreeing with the Tenth Circuit, found that because the record below was inconclusive as to whether Salem was convicted of an aggravated felony, he is ineligible for cancellation relief. In so deciding, the Fourth Circuit expressly disagreed with the Second and Ninth Circuits. In conjunction with the Yale Supreme Court Clinic, we filed a petition for writ of certiorari on behalf of Salem.
11-824	*Schafer v. Astrue* Distributed for 3/30/12 conference	A. Pincus C. Rothfeld P. Hughes M. Kimberly	This case presents essentially the same question as *Astrue v. Capato*, No. 11-159, where we now represent respondent on the merits. The Fourth Circuit concluded that an individual's posthumously-conceived biological offspring is not that individual's "child" within the meaning of the Social Security Act's provision governing survivor's benefits. In

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			conjunction with the Yale Supreme Court Clinic, we filed a petition for certiorari on behalf of W.M.S., who was conceived after her father's death using sperm that her parents had preserved during their marriage. The case is being held for *Capato*.
11-889	*Tarrant Regional Water District v. Herrmann* CVSG'd 4/2/12	T. Bishop C. Rothfeld M. Kimberly	The Tenth Circuit rejected Commerce Clause and preemption challenges to Oklahoma statutes that discriminate against out-of-state water users accessing Red River water allocated to them by interstate compact. We filed a petition for writ of certiorari on behalf of a Texas water management agency. The Court has invited the Solicitor General to file a brief expressing the views of the United States.
11-343	*United States v. Segal* Cert. denied 3/19/12	A. Frey E. Oyer J. Minta	Michael Segal was convicted on several counts of mail and wire fraud. After the Supreme Court decided *Skilling v. United States*, the Government conceded that the honest-services-fraud instructions given to the jury were erroneous. The Seventh Circuit concluded that the error was harmless, holding that the jury implicitly convicted Segal of ordinary fraud in connection with his insurance company's premium trust account. In the process, the Seventh Circuit deepened two distinct circuit splits. First, the Seventh Circuit held that the Government did not have to prove that Segal intended to harm the alleged victims of the fraud. Second, the Seventh Circuit held that false statements in Segal's insurance brokerage license renewal statements to an Illinois regulatory agency were sufficient to support his fraud convictions, even though the statements were never made to the alleged victims. We have filed a petition for writ of certiorari.
11-1119	*Yang v. Holder* Cert. petition filed 3/12/12 Response due 5/14/12	A. Pincus C. Rothfeld P. Hughes M. Kimberly	Federal regulations direct that, if credible, the testimony of an applicant for asylum may be sufficient to satisfy the applicant's burden of proof. The courts of appeals have disagreed as to whether an immigration judge must expressly rule on the applicant's credibility prior to denying asylum on the basis that the applicant has failed to offer corroborating documents. In conjunction with the Yale Supreme Court Clinic, we have filed a petition for certiorari on behalf of Rui

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			Yang contending that the Fifth Circuit erred in affirming the denial of Yang's asylum application, given the immigrant judge's failure to make a credibility determination.