

*Editor's Note: The following two articles are based on Diane F. Bosse's and Laurel S. Terry's presentations at their joint session "Admitting Foreign-Trained Lawyers: Understanding the Issues" at the 2014 NCBE Annual Bar Admissions Conference held on May 1–4, 2014, in Seattle, Washington. The articles are intended to complement each other by providing a snapshot of the foreign-educated applicant pool taking the New York Bar Examination and the rules by which these applicants may qualify to take the exam, and exploring the broader range of methods by which foreign-educated applicants may be permitted to practice in U.S. jurisdictions, including a discussion of the reasons why jurisdictions should consider rules regarding these methods.*

## TESTING FOREIGN-TRAINED APPLICANTS IN A NEW YORK STATE OF MIND

by Diane F. Bosse

The United States recognizes 195 independent states in the world.<sup>1</sup> In 2013, candidates from 111 of them came to New York to take our bar exam. From every continent, from Azerbaijan to Zimbabwe, and from Eritrea to Ecuador, they came, 4,602 in number. Where did they come from? Why did they come? How did they qualify to take our exam? And how did they fare on the test? This article offers answers to those questions. First, some history.

In the August 1998 edition of this publication, an article appeared describing the New York Court of Appeals' recently revised rules regarding the educational eligibility requirements to sit for the New York Bar Exam, including those for foreign-educated attorneys.<sup>2</sup> The article, co-authored by then Court of Appeals Associate Judge Howard A. Levine and Court Attorney for Professional Matters Hope B. Engel, offered the following premise for New York's approach to the eligibility of foreign lawyers:

New York State is a center for international trade and commerce. Recognizing that lawyers play an important role in the global economy and that the international markets demand competent

attorneys able to oversee cross-border issues, the Court reviewed its Rules authorizing foreign-trained attorneys to sit for the New York State bar examination. Consistent with the General Agreement on Trade in Services (GATS), negotiated by the United States Trade Representative, the Court sought to update its rules to allow for transnational legal service without diminishing the quality of legal representation to be provided or the qualifications of New York admitted attorneys.<sup>3</sup>

In 1997, the year before the new rules were enacted, New York tested 1,701 foreign-educated candidates, 15% of our candidate pool of 11,205.<sup>4</sup> In 2013, the 4,602 foreign-educated candidates we tested comprised 29% of our candidate pool of 15,846. Between 1997 and 2013, the number of graduates of ABA-approved law schools we tested increased by 18%; the number of our foreign-educated candidates grew in that period by 170%. The percentage of foreign-educated candidates in our test population will likely increase in the coming years, given the decline in enrollment in J.D. programs at ABA-approved law schools<sup>5</sup> and the burgeoning number

of LL.M. programs in those institutions,<sup>6</sup> designed to prepare foreign-educated lawyers for bar admission in the United States.

## WHERE DO THEY COME FROM?

Of the 111 foreign countries represented in our 2013 candidate pool, most had fewer than 10 candidates sitting for our bar exam. However, more than 100 candidates hailed from each of the 10 countries indicated in Table 1.

Our Chinese candidate pool is our largest contingent and has seen the most dramatic increase. The number of candidates coming to New York for our bar exam from China was 115 in 2000 and 500 in 2008. That number increased to 1,148 in 2013.<sup>7</sup> In addition to China, Brazil, Korea, and Russia also saw significant increases in the number of candidates. Over the last few years, Brazil has replaced Australia on the 100+ candidate list. In addition to Australia, Canada, Germany, Israel, the Philippines, and Spain have seen their numbers decline.

## WHY DO THEY COME?

Foreign-educated law graduates seek admission to practice in New York for reasons likely as varied

**Table 1:** Countries with More than 100 Candidates Taking the New York Bar Exam in 2013

COUNTRY	NUMBER
China	1,148*
United Kingdom	566
Japan	365
Korea	301
France	202
India	172
Canada	156
Nigeria	129
Brazil	122
Ireland	104

\* This number includes 52 candidates from Hong Kong and 174 candidates from Taiwan.

as the lands from which they travel to take the test. First, there are significant immigrant populations in New York, and many foreign-educated lawyers are engaged in practices that serve their needs.

Second, admission to the New York Bar is a valuable employment credential for many foreign-educated law graduates. There are a few different reasons for this. New York is the jurisdiction selected in the choice of law provision in many international contracts, thereby making New York law the one agreed to by all parties in interpreting the agreement. Thus, admission to the New York Bar, and presumed competence in New York law, is an asset to a lawyer seeking employment in an international law firm, in New York or elsewhere around the world.

Strong American influence on global corporate, insurance, intellectual property, banking, securities, and antitrust law make the combination of an LL.M. degree from an American law school and bar admission in the United States a valuable employment credential. New York is most frequently the forum of choice to take the bar exam in the United States for foreign-educated candidates hoping to gain that credential because of its less stringent eligibility requirements, the number of international law firms having offices in New York, and New York's perceived position in global financial affairs. In 2013, 5,928 foreign-educated candidates sat for a bar examination in the United States. They sat in 28 separate jurisdictions, with 4,602 of them sitting in New York.<sup>8</sup>

In some countries, admission to practice is quite restricted, by quotas and/or low passing rates on the licensing exams. Law graduates from those countries may take the New York Bar Exam in order to become employed in international law firms in their home countries, practicing international law, despite being unable to gain admission to practice local law.

Then there are candidates who are able to gain admission in their home countries more readily as a member of the New York Bar. Take the example of the law graduate seeking to become a solicitor in England. Following completion of the academic requirements and a Legal Practice Course, the potential solicitor must complete practice-based training, through a training contract. If unable to secure a training contract, the candidate can come to New York and take our bar exam, without further education or training, and, on passing our exam and being admitted to practice in our state, take the tests comprising the Qualified Lawyers Transfer Scheme.<sup>9</sup> Upon passing those tests, the candidate will then qualify for admission as a solicitor in England, without having completed a training contract.

Similarly, a French law graduate who obtains an LL.M. degree, and who takes and passes the New York Bar Exam and is admitted to practice in New York, can be admitted to practice in France under special procedures available to non-European Union attorneys.<sup>10</sup> Specifically, such candidates are exempt from the required 18 months of training in an *École des Avocats* (EDA), a regional school in charge of the professional training of lawyers, and they take an exam to assess their knowledge of French law instead of the *Certificat d'Aptitude à la Profession d'Avocat* (CAPA), which is the French bar exam.

For these reasons and others, with each passing year, more and more foreign-educated candidates apply for a determination of eligibility to take the New York Bar Exam.

## HOW DO THEY QUALIFY?

Foreign-educated law graduates can qualify to take the New York Bar Exam by following one of three routes.<sup>11</sup> The first route is available to law graduates educated in common law countries. A candidate who received a law degree from an accredited institution

in a common law country, satisfying the educational requirements for admission to practice in that country, may qualify to take the New York Bar Exam without further education, provided that the candidate's program of legal education was durationally and substantively equivalent to an ABA-approved law school J.D. program.<sup>12</sup> A candidate can "cure" a substantive or durational deficiency, but not both, by taking an LL.M. program meeting the requirements of our rule at an ABA-approved law school in the United States.<sup>13</sup>

Candidates from non-common law countries can also qualify, but they are generally required to meet an additional educational component. A candidate who received a law degree from an accredited institution in a non-common law country, satisfying the educational requirements for admission to practice in that country, whose program of legal education was either substantively or durationally equivalent to an ABA-approved law school J.D. program, can cure a substantive or durational deficiency, but not both, by taking an LL.M. program meeting the requirements of our rule at an ABA-approved law school in the United States.<sup>14</sup> Essentially, if a candidate has had three years of full-time or four years of part-time legal education satisfying the educational requirements for admission in the country where the education was completed, by obtaining an LL.M. degree in the United States in conformity with New York's specific curricular requirements, the candidate can qualify to take our bar exam.

The final path for foreign-educated candidates to establish eligibility to sit for our bar exam is the only route that requires admission to practice. A candidate admitted to practice in a common law country, with an education that was both durationally and substantively deficient as compared to the education provided in an ABA-approved law school J.D. program, can, in some cases, cure the

deficiency by taking an LL.M. program meeting the requirements of our rule at an ABA-approved law school in the United States.<sup>15</sup> The candidates who qualify under this track are generally solicitors in the United Kingdom whose undergraduate degree was not a qualifying law degree, as defined by the Solicitors Regulation Authority, but who qualified for and were admitted to practice through a separate process, involving further academic and vocational training, following their undergraduate degree.<sup>16</sup>

In essence, there are six components to determining if a foreign-educated candidate can qualify to sit for the bar exam in New York:

- Does the applicant have a *qualifying* degree in *law*?
- Is the degree from an *accredited* institution?
- Was the degree obtained in a *common law* country?
- Was the education received *substantially equivalent in substance* to that of an ABA-approved law school J.D. program?
- Was the period of law study *substantially equivalent in duration* to that of an ABA-approved law school J.D. program?
- Is a *cure* available and appropriately completed?

“Substantial equivalence” is not “substantial compliance” with the ABA Standards for accreditation. Based on our staff’s knowledge and experience in examining educational programs and educational requirements for admission to practice in common law countries, as well as student transcripts, a degree in law that qualifies a candidate for admission in his or her home country is often a proxy for substantial equivalence in substance.<sup>17</sup> Substantial equivalence in duration is typically confirmed by review of the candidate’s transcript, requiring proof of attendance for three academic years (full-time) or four academic years (part-time), review of courses taken (with an expectation of six to eight courses per academic year

for full-time equivalence), and a written statement from the degree-conferring institution providing proof of durationally equivalent legal education.

No statistics are kept on the number of foreign applicants denied eligibility to take the New York Bar Exam, but common causes of denial are that the degree obtained in the foreign country was not a degree in law, that the degree was obtained through distance education, and/or that the period of law study in a non-common law country was not durationally sufficient.

### **New York’s Recent Amendments to its LL.M. Program Requirements**

In 2011, the New York Court of Appeals amended its rule regarding the specific requirements for an LL.M. program sufficient to qualify as a “cure” for the substantive or durational deficiency in the legal education of a foreign-educated candidate.<sup>18</sup> This amendment came after the Court observed over a number of years that many LL.M. programs were focused on international finance and similar disciplines with little emphasis on United States or New York law. Some programs did not require students to attend any classes in the United States; others were of brief duration and uncertain pedagogical value. Coupled with the comparatively low passing rate of many of the candidates qualifying to take the New York Bar Exam based on these programs and their high cost, the Court felt that some additional prescription for these programs was in order. A qualifying LL.M. program must now meet these requirements:

- 24 credit hours;
- at least two semesters;
- no more than four credit hours taken in the summer;
- all coursework completed at the campus of an ABA-approved law school in the United States;

- program completed within 24 months of matriculation;
- no credit for distance education courses;
- at least two credit hours each in professional responsibility, legal research and writing, and American legal studies;
- at least six hours in other courses tested on the New York Bar Exam;
- a maximum of four hours in clinical courses; and
- a maximum of six hours in other courses related to legal training taught in the United States by faculty of the law school or its affiliated university or by faculty of an institution with which the law school offers a joint degree.

The American legal studies requirement can be fulfilled by a course “in American legal studies . . . or a similar course designed to introduce students to distinctive aspects and/or fundamental principles of United States law,” such as a course in United States constitutional law or federal or state civil procedure.<sup>19</sup>

The Court wanted to encourage foreign students to engage with their fellow students and professors, to their common benefit, enriching the law school community and the experience of all its constituents. The requirements that the program not be completed in the summer, that it be completed on the United States campus of the law school, and that it not include distance education courses reflected the Court’s intent that the students seeking a degree to satisfy the educational requirements to become a New York lawyer should be exposed to the maximum extent possible to the academic life of an American law school with the rich opportunities for acculturation and professional development presented by that experience.

The limit on credit hours in “other courses related to legal training” was designed to ensure that

the course of study followed by the student was primarily in law courses, while permitting some courses to be taken outside of the law school.

Approximately 75% of our foreign-educated candidates qualify to take the New York Bar Exam based upon having completed an LL.M. degree, with approximately 25% qualifying based on their foreign education alone. An emerging trend is for candidates with a common law education sufficient to qualify them to sit for the bar exam to nonetheless seek an LL.M. degree because of the employment opportunities such a degree offers.

## AND HOW DO THEY DO?

A candidate who survives the scrutiny of the qualification process can then take the test. The passing rates vary significantly and are consistently substantially below the passing rates for J.D. graduates of ABA-approved law schools. The passing rates of the 10 countries that had more than 100 candidates sitting for the New York Bar Exam in 2013 are shown in Table 2.

There were seven countries that had between 50 and 100 candidates sitting for the New York Bar

**Table 2:** Passing Rates of the 10 Countries with More than 100 Candidates Taking the New York Bar Exam in 2013

COUNTRY/NUMBER OF CANDIDATES	PASSING RATE
Canada (156)	64.1%
France (202)	48.5%
Japan (365)	43.3%
Ireland (104)	35.6%
Brazil (122)	34.4%
China (1,148)	33.3%
United Kingdom (566)	30.4%
Korea (301)	30.2%
India (172)	22.7%
Nigeria (129)	10.1%

**Table 3:** Passing Rates of the Seven Countries with 50–100 Candidates Taking the New York Bar Exam in 2013

COUNTRY/NUMBER OF CANDIDATES	PASSING RATE
Australia (83)	60.2%
Germany (56)	55.4%
Israel (64)	45.3%
Mexico (67)	43.3%
Italy (77)	39.0%
Russia (78)	35.9%
Colombia (61)	23.0%

Exam in 2013. Those countries and their passing rates are shown in Table 3.

Three countries in the world had a 100% passing rate on the New York Bar Exam in 2013: Malaysia, Malta, and Togo each had one candidate sit for our bar exam, and in each case, the candidate passed.

The passing rates for foreign-educated candidates have been fairly consistent over the last five years, with first-time takers of the exam passing at a rate on average of 44%, and with all foreign-educated candidates (including first-time takers and those repeating the test) achieving a passing rate averaging 34%. That contrasts with an average passing rate for first-time takers who graduated with a J.D. degree from an ABA-approved law school of 85% and for all ABA graduates of 76%.

## CONCLUSION

The New York Court of Appeals made the policy choices it did in crafting rules for the admission of foreign-trained lawyers with an eye toward New York's unique position in international trade and commerce. But New York is not alone in the engagement of its citizens with foreign nationals and the need for lawyers trained to deal with legal issues that cross international borders.

Jurisdictions considering adopting rules relating to the eligibility of foreign-educated candidates to sit for their bar exams might consider whether to require that the foreign-educated candidate

- have been educated in a common law country;
- have a law degree, as opposed to a degree in another discipline;
- be admitted to practice in his or her home country;
- have practice experience in his or her home country;
- have an LL.M. degree meeting defined curricular requirements; and
- have taken courses such as civil procedure, legal research and writing, and professional responsibility.

Of course, aside from full admission, there are other mechanisms by which foreign-trained lawyers can practice on a limited scale in the United States, including pro hac vice admission, temporary practice rules, registration as in-house counsel, and admission as a foreign legal consultant. Rules permitting such limited practice merit consideration, whether or not full admission is available to the candidate educated outside the United States.

New York's central position in the global economy was the impetus for the establishment of rules that permit foreign-educated law graduates to sit for the bar exam in New York. The result has been explosive growth in the numbers of such candidates and the number of places in the world from which they come. Indeed, the New York Bar Exam itself has become an instrument of international commerce! 

## NOTES

1. Independent States in the World, Fact Sheet (Sept. 12, 2014), U.S. Department of State, Bureau of Intelligence and Research, <http://www.state.gov/s/inr/rls/4250.htm> (last visited Oct. 2, 2014).

2. Howard A. Levine & Hope B. Engel, *New York's Revised Attorney Admission Rules: Still Rigorous but More "User-Friendly,"* 67(3) THE BAR EXAMINER 39–44 (August 1998).
3. *Id.* at 41.
4. All statistics regarding the New York Bar Exam in this article were obtained from a review of the statistics on candidate pools and performance maintained by the New York State Board of Law Examiners.
5. Enrollment in J.D. programs at ABA-approved law schools declined by 24% from fall 2010 to fall 2013. American Bar Association, ABA Section of Legal Education reports 2013 law school enrollment data, [http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba\\_section\\_of\\_legal.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba_section_of_legal.html) (last visited Oct. 30, 2014).
6. There are over 400 non-J.D. programs currently offered by ABA-approved law schools. See American Bar Association, Programs by Category, [http://www.americanbar.org/groups/legal\\_education/resources/llm-degrees\\_post\\_j\\_d\\_non\\_j\\_d/programs\\_by\\_category.html](http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html) (last visited Oct. 30, 2014).
7. This number includes 52 candidates from Hong Kong and 174 candidates from Taiwan.
8. 2013 Statistics, 83(1) THE BAR EXAMINER 6 (March 2014), at 10–11.
9. The Qualified Lawyers Transfer Scheme provides a route by which foreign-licensed attorneys can be admitted to practice as solicitors in England and Wales. See Solicitors Regulation Authority, Qualified Lawyers Transfer Scheme, <http://www.sra.org.uk/solicitors/qlts.page> (last visited Oct. 21, 2014). [Editor's Note: For a description of the Qualified Lawyers Transfer Scheme, see Susan M. Case, Ph.D., *The Testing Column: Testing Foreign-Trained Lawyers: A New Exam in England and Wales*, 80(3) THE BAR EXAMINER 34–37 (September 2011).]
10. Conseil National des Barreaux, The Legal Profession in France, Being a Lawyer in France: Accessing the Legal Profession, [http://cnb.avocat.fr/Being-a-Lawyer-in-France-Accessing-the-Legal-Profession\\_a1735.html](http://cnb.avocat.fr/Being-a-Lawyer-in-France-Accessing-the-Legal-Profession_a1735.html) (last visited Oct. 27, 2014). See also RUSSELL W. DOMBROW & NANCY A. MATOS, THE ABA GUIDE TO INTERNATIONAL BAR ADMISSIONS 149–160 (ABA Publishing 2012).
11. Rules of the Court of Appeals [22 N.Y.C.R.R.] § 520.6.
12. *Id.* § 520.6(b)(1).
13. *Id.* § 520.6(b)(1)(ii).
14. *Id.* § 520.6(b)(1)(ii).
15. *Id.* § 520.6(b)(2).
16. These candidates qualify for admission as a solicitor generally through the completion of a one- or two-year Common Professional Examination course of study (also referred to as a Graduate Diploma in Law) following their undergraduate degree, satisfying the academic stage of education, plus a Legal Practice Course and a period of recognized training,

satisfying the requirements for the vocational stage of training required for admission. Solicitors Regulation Authority, SRA Training Regulations 2014—Qualification and Provider Regulations, <http://www.sra.org.uk/solicitors/handbook/trainingregs2014/content.page> (last visited Oct. 29, 2014).

17. For example, in England and Wales, students are required to take and pass seven courses in the Foundations of Legal Knowledge, identified as Public Law, including Constitutional Law, Administrative Law, and Human Rights; Law of the European Union; Criminal Law; Obligations, including Contracts, Restitution, and Torts; Property Law; and Equity and the Law of Trusts. See Bar Standards Board & Solicitors Regulation Authority, Academic Stage Handbook, Schedule Two (July 2014), available at <http://www.sra.org.uk/students/academic-stage.page>. In Nigeria, required courses for a law degree are Legal Methods, Nigerian Legal System, Contracts, Constitutional Law, Company Law, Commercial Law, Criminal Law, Equity and Trusts, Evidence, Land Law, Torts, and Jurisprudence. See International Bar Association, How to qualify as a lawyer in Nigeria, [http://www.ibanet.org/PPID/Constituent/Student\\_Committee/qualify\\_lawyer\\_Nigeria.aspx](http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_Nigeria.aspx) (last visited Nov. 1, 2014). In Australia, law students are required to take the “Priestley Eleven,” which are Criminal Law and Procedure, Torts, Contracts, Property, Equity (including Trusts), Company Law, Administrative Law, Federal and State Constitutional Law, Civil Procedure, Evidence, and Ethics and Professional Responsibility. See, e.g., Supreme Court of Victoria Council of Legal Education Board of Examiners, [http://www.lawadmissions.vic.gov.au/admission\\_requirements](http://www.lawadmissions.vic.gov.au/admission_requirements) (last visited Nov. 1, 2014).
18. Rules of the Court of Appeals, *supra* note 11, § 520.6(b)(3).
19. *Id.* § 520.6(b)(3)(vi)(c).



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