

FROM: Boston Bar Association  
TO: Board of Bar Examiners  
RE: Admission of foreign-trained lawyers to the Massachusetts Bar  
DATE: March 18, 2008

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In response to your suggestion that the Boston Bar Association express its views on the criteria for permitting lawyers qualified in jurisdictions outside the United States, other than Canada, to take the examination for admission to the Bar of the Supreme Judicial Court of Massachusetts, the Boston Bar Association is pleased to submit this memorandum for your consideration.

### Recommendations

In summary, the BBA believes that the Board of Bar Examiners should provide written guidance for foreign-trained lawyers applying to take the Massachusetts bar examination consistent with the following:

- The *Wei Jia* and *Osakwe* cases provide the basic guidelines from the SJC on the matter of permitting foreign trained lawyers to take the examination for admission to the Massachusetts bar. Based on these cases, we believe that legal education requirements, including both general education in common law and particular education in American law, are the key criteria for eligibility to take the examination for admission to the Massachusetts bar. (There is no suggestion that any foreign lawyer could be admitted to the Massachusetts bar by waiver.)
- For common law-trained lawyers, the criteria for admission can be summarized as follows:
  1. The conferment of a J.D., an L.L.B. or equivalent degree from a law faculty in a jurisdiction whose laws and legal education are based on the English common law tradition (general education); and
  2. The completion for credit of American law courses at an American law school which would give a student "sufficient exposure to American law"<sup>1</sup> (specific education). These courses may be:
    - a. the courses taken by Mr. Osakwe at the University of Connecticut which were:
      - i. American civil procedure,
      - ii. American criminal procedure,
      - iii. Immigration law.
      - iv. Federal taxation,
      - v. Torts and
      - vi. United States law and legal institutions;<sup>2</sup> or
    - b. the courses currently prescribed by the BBE for foreign lawyers trained in the common law:

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<sup>1</sup> *Osakwe v. Board of Bar Examiners, supra.*

<sup>2</sup> *Ibid.*

- i. American Constitutional Law.
- ii. Federal Courts and Jurisprudence,
- iii. the Uniform Commercial Code, and
- iv. the core curricular courses offered in the first year at ABA-approved law schools.<sup>3</sup>

- On the other hand, for civil law-trained lawyers both the general education in common law and the particular education in American law would have to be obtained only through course work in an American law school. Though the SJC has not ruled in this issue, the educational requirements that can be prescribed for these purposes might comprise all of the courses taught in the 1L year curriculum at an American law school such as:
  - a. Constitutional Law,
  - b. Contracts,
  - c. Criminal Law,
  - d. Civil Procedure,
  - e. Property,
  - f. Torts and
  - g. a research and writing seminar.
- The courses should be satisfactorily completed in an ABA accredited academic environment, for a passing grade, which includes opportunity for dialog and testing, not through independent study, on-line or isolated study.
- There should be no requirement that candidates have successfully completed a JD or an LLM.
- Admission to practice before the highest court of any other state or territory of the United States (or any other bar) was not used in either *Wei Jia* or *Osakwe* as a separate criterion. Membership in another American bar was used in the *Osakwe* case merely to reinforce the fact that the petitioner had the necessary specific American legal education. Thus, the requirements for membership in the Massachusetts bar need not be expanded to include bar membership elsewhere.

The BBA encourages the Board to consider formalizing these criteria into an appropriate form of written guidance in order to provide added clarity to foreign-trained lawyers as to the criteria for sitting for the Massachusetts Bar examination. Among other benefits, this would have the salutary effect of making our system more transparent and competitive with other U.S. jurisdictions consistent with the underlying protections that are clearly at the heart of the SJC's guidelines. We would be pleased to discuss the contents of this memorandum with the BBE at your convenience and to work with you in connection with your self-study and the development of written criteria which reflect the above proposed guidance derived from the SJC in *Wei Jia* and *Osakwe*.

#### Discussion

Much has been made of the recent decision of the Massachusetts Supreme Judicial Court (SJC) in the case of *Gregory C. Osakwe v. Board of Bar Examiners*<sup>4</sup> (hereinafter, *Osakwe*).

<sup>3</sup> Information, 2.

Advocates of allowing foreign-trained lawyers to sit for the bar examination in Massachusetts have seen the decision as a breakthrough and have cast the case as a signal that the SJC has softened its stand on the issue.

However, further examination of *Osakwe*, especially in light of the earlier *Wei Jia v. Board of Bar Examiners*<sup>5</sup> (hereinafter, *Wei Jia*) shows that this is not necessarily so. Rather, the *Osakwe* case merely reinforces the SJC's decision in the earlier ruling and still leaves unanswered the status of law graduates who were educated in the civil law tradition.

#### The *Osakwe* Case

Mr. Gregory Osakwe petitioned the Massachusetts Board of Bar Examiner (BBE) to be allowed to sit for the Massachusetts bar examination. Mr. Osakwe earned his Bachelor of Laws from the University of Nigeria and had qualified for the bar in that country. He subsequently moved to Trinidad and Tobago where he earned a legal certificate at the Hugh Wooding Law School and was admitted to practice in that country. He then moved to Connecticut and obtained an LL.M. degree from the University of Connecticut. He was admitted to the New York bar in 2003 and, in that same year, was admitted to practice before the US District Court for the District of Connecticut. At the time of the petition, he was practicing immigration law in Connecticut and New York.<sup>6</sup>

His petition was denied by the BBE which cited his lack of a J.D. degree as its basis. He then filed a complaint for administrative review before the Superior Court, which was denied. Subsequently, he brought a petition and a motion for reconsideration to the SJC, which were both denied by a single justice. The case then came before the full court, which granted Osakwe's petition to sit for the Massachusetts bar examination.<sup>7</sup>

The SJC's decision was based mainly on Osakwe's education and his practice in the United States.

In discussing Osakwe's education, the SJC made a distinction between:

- a. His general education in the common law – the “evaluation of exposure to the common-law tradition -- its topical division of the law, its principles of reasoning and its basic rules.”<sup>8</sup> As regards an evaluation of this, the BBE looks to whether the “applicant has studied in the common-law faculty of a school in a country “whose jurisprudence rests upon the common law tradition.”<sup>9</sup> and
- b. His particular education in American law – in recognition of the fact that the “requirement of particular exposure to American law may be a frequently encountered deficiency for foreign-educated applicants.”<sup>10</sup> In this case, the BBE may require

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<sup>4</sup> *Osakwe v. Board of Bar Examiners*, 448 Mass. 85 (2006).

<sup>5</sup> *Wei Jia v. Board of Bar Examiners*, 427 Mass 777 (1998).

<sup>6</sup> *Osakwe v. Board of Bar Examiners*, *supra* at 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

additional coursework in particularly American subjects such as American constitutional law, Federal courts and jurisprudence and the Uniform Commercial Code.<sup>11</sup>

Using this framework, the SJC found that:

a. Re: general education in the common law – “Nigeria, like Massachusetts, has a legal system derived from the English common-law tradition.”<sup>12</sup> Osakwe’s transcript from the University of Nigeria shows “courses in property, torts, contract, evidence, constitutional law, land law, equity, jurisprudence, company law, international law, and commercial law. His transcript from the Nigerian law school shows further courses in civil procedure, criminal procedure, company law, evidence, and the completion of a general paper in law and ethics.”<sup>13</sup> The SJC further noted that the correspondence between the Nigerian law courses and courses at an ABA-approved law school did not stop at the names of the courses but to the substance of those courses as shown by the course descriptions submitted.<sup>14</sup>

b. Re: particular education in American law – Osakwe had sufficient exposure to American law based on the fact that he undertook “graded course work in American civil procedure, American criminal procedure, immigration law, Federal taxation, torts and United States law and legal institutions.”<sup>15</sup>

Finally, as part of the particular analysis (that is, establishing that he had a particular education in American law), the SJC took into consideration that Osakwe had been admitted to the New York Bar and practiced for three years in the Federal bar in the District of Connecticut and in New York.<sup>16</sup> The SJC said that an analysis of his practice was “relevant to the particular analysis and helpful (although not conclusive) to his claim.”<sup>17</sup>

In the *Osakwe* case, it is interesting to note that the SJC centered its discussion on Osakwe’s education. His professional experience, though a consideration, was actually seen as a support to Osakwe’s claim of being educated in the American legal tradition rather than being used as a separate criteria by which to judge his qualifications. Moreover, it should be noted that the *Osakwe* case mentioned the *Wei Jia* case several times and made an effort to distinguish the circumstances in *Wei Jia* from *Osakwe*.

#### The *Wei Jia* case revisited and distinguished

The issue in the case of *Wei Jia* and *Osakwe* is the same: whether a lawyer educated in a foreign jurisdiction may be allowed to sit for the Massachusetts bar examination. In the *Wei Jia* case, the SJC did not allow the petition principally because *Wei Jia* did not have an educational background which was comparable to an American J.D.

In the *Wei Jia* case, the petitioner obtained his LL.B. in China and subsequently earned a Master of Comparative Law and a Doctor Juridical Science (JSD) degree at Tulane University.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

While at Tulane, he took the following courses for credit: Introduction to American Legal System and Law (a two credit class lasting for three weeks); Legal Research and Writing (a three credit class offered in the fall semester); Contracts I; Business Enterprises I; European Economic Community Law; Transnational Litigation; Financial Institutions; International Business Transactions; International Trade and Finance; and Directed Research. He also audited one course each in torts, civil procedure and criminal procedure. The record did not reflect the additional courses he took for his SJD for which he completed a dissertation thesis.<sup>18</sup> He then was admitted to the bar in the states of Louisiana and New York.<sup>19</sup>

As distinguished from the *Osakwe* case, whereas Wei Jia obtained his LL.B. in China, whose legal educational system is not based on the English common-law tradition, *Osakwe* was educated in the Nigeria, which is a part of the English common-law system, and took classes which were substantially comparable to courses found in American law schools.<sup>20</sup> This reliance on the English common-law background of the Nigerian system allowed *Osakwe* to pass the SJC's scrutiny insofar as his general common law education was concerned.

Furthermore, in examining Wei Jia's legal education in America, the SJC observed that most of the courses he took at Tulane did not make his education equivalent to the legal education obtained in a J.D. degree.<sup>21</sup> The subjects taken were almost all related to his field of interest, which was in international business transactions. In fact, of the core subjects required of a J.D. candidate, he only completed one, contracts. The three-week course in American legal system is not a substitute for a semester or more of study and examination even if it covers the following 'substantive' American law subjects: "contracts, torts, civil procedure, federal jurisdiction, statutory construction, constitutional law, criminal procedure, administrative law and antitrust."<sup>22</sup> Moreover, the fact that Wei Jia audited several courses, which are also required of J.D. candidates, is not equivalent to enrolling in the same course for credit and passing an examination therefor.<sup>23</sup> In contrast, *Osakwe* took for credit a number of courses at the University of Connecticut which are also required in order to obtain a J.D. degree: American civil procedure, American criminal procedure, immigration law, Federal taxation, torts and United States law and legal institutions.<sup>24</sup> Thus, *Osakwe* passed the SJC's scrutiny as regards its requirement that he have knowledge of American law while Wei Jia did not.

Futhermore, what was also persuasive to the SJC was that *Osakwe* was not only admitted to practice law in courts in America but that he actually practiced immigration law. In contrast, Wei Jia, though admitted in Louisiana and New York, never practiced law in America.<sup>25</sup> Note, however, the fact that *Osakwe* actually practiced law in America was not seen by the SJC as an additional requirement which he needed to hurdle in order to take the Massachusetts bar

<sup>18</sup> *Wei Jia v. Board of Bar Examiners, supra* at 2.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Osakwe v. Board of Bar Examiners, supra* at 2.

<sup>21</sup> *Wei Jia v. Board of Bar Examiners, supra* at 2.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Osakwe v. Board of Bar Examiners, supra* at 2.

<sup>25</sup> *Ibid.* See footnote 11: "The board contests the relevance of *Osakwe's* legal practice experience by stating that it was 'limited to the 'practice of Immigration Law and Federal Law.'" The board may be relying on language in *Wei Jia, supra* at 785, where he stated that "[w]hile admission to practice in other jurisdictions is not wholly irrelevant, in this case [Wei Jia] had never actually practiced..." We find the nature and extent of *Osakwe's* practice substantively different from *Wei Jia's*. *Wei Jia* 'never actually practiced,' as *Osakwe* has." (Emphasis supplied).

examination. Rather, it was seen as further support to bolster the argument in favor of Osakwe having the necessary "particular education in American law."<sup>26</sup>

It was observed at the onset that the SJC did not have a change of policy from the *Wei Jia* case to the *Osakwe* case. In fact, it can be argued that the *Osakwe* case logically flowed from the *Wei Jia* case. In a real sense, Mr. Osakwe's petition to take the Massachusetts bar examination succeeded because he had all the characteristics that Mr. Wei Jia did not have. He was the anti-Wei Jia.

It is significant to observe the SJC's words in summarizing the *Wei Jia* case (which was also quoted in the *Osakwe* case:

"If greater similarities existed between the law of the People's Republic of China and our law; if the former was based on the English common-law system, which it is not; if the petitioner, as a graduate student at Tulane, had taken for credit and passed more of the courses required of a juris doctor degree, which he has not; if the petitioner had engaged in the practice of law in Louisiana or New York for some period of time, which he has not, this would be a different case. xxx"<sup>27</sup>

By contrast, Mr. Osakwe had every qualification that would have disqualified Wei Jia: he was common law educated, took JD classes for credit and practiced law in America. He was the candidate against whom the SJC would have not objection.

Finally, it must be observed that the SJC's analysis centered on the educational attainment of both parties. In the *Wei Jia* case, it would seem that the SJC was also considering legal practice as a requirement. However, the *Osakwe* case modified this somewhat by considering it as further proof of its specific requirement that the petitioner have knowledge of American law. This may be instructive insofar as any recommendations that should be made for other foreign lawyers sitting for the Massachusetts bar examination.

#### Lawyers from Civil Law Jurisdictions in Legal Limbo

Although the *Osakwe* case did not reveal any change in the SJC's treatment of foreign-trained lawyers, what it did provide was the guidelines by which to judge the fitness of a foreigner trained in the common law in order for that person to sit for the Massachusetts bar examination. Going forward, whenever a common law-trained lawyer applies for admission to the bar, all the BBE will have to do is apply the general and particular education standards that the SJC used in *Osakwe*.

However, the *Osakwe* case still does not provide any guidance as regards lawyers who were educated in the civil law system, that is, those whose legal education was based on the French, Spanish, Italian or German models. It is significant to address this deficiency since it can be posited that more foreign lawyers are educated under this system rather than the common law system, which only includes lawyers from Britain and the Commonwealth.

Since Wei Jia was educated in the civil law tradition and his petition was denied, it may be assumed that the SJC was not amenable to allowing foreign lawyers trained in this system to sit for the Massachusetts bar examination. This is a reasonable conclusion not only because of the

<sup>26</sup> *Ibid.*

<sup>27</sup> *Wei Jia v. Board of Bar Examiners, supra* at 2.

ruling in the *Wei Jia* case but also because the information pamphlet given to foreign-trained lawyers does not contain any reference to lawyers not trained in the common law system.<sup>28</sup>

However, there is no absolute bar to civil law-trained lawyer. The SJC itself noted that, in 1997, twenty-nine non-common law trained lawyers applied for admission to the Massachusetts bar. Of these applications, twenty-six were rejected. The remaining three were allowed to sit for the Massachusetts bar examination, subject to the fulfillment of certain education requirements.<sup>29</sup>

Furthermore, the *Wei Jia* case itself provides some clues as to what standards might be relied upon to allow a civil law-trained foreign lawyer to sit for the Massachusetts bar examination. In this case, it was mentioned that the BBE has determined that it will generally require applicants from foreign countries to take courses in "American Constitutional Law, Federal Courts and Jurisprudence, the Uniform Commercial Code and the other core curricular courses offered in the first year at ABA-approved law schools."<sup>30</sup> Not only must an applicant take these courses, he or she must take these for credit or be tested on his or her knowledge of the course.<sup>31</sup> The SJC stated that "an equivalent legal education is not to test the intellectual capabilities of an attorney who has graduated from a foreign institution, but to examine the applicant's familiarity with the fundamentals of American law."<sup>32</sup>

It can be argued that this notion of an "acceptable legal education" corresponds to the course work that a JD student at an American law school would encounter in his or her first or IL year.<sup>33</sup> This would be akin to the BBE's present policy of requiring common law trained lawyers sitting for the Massachusetts bar to take a selected menu of courses at an American law school.<sup>34</sup>

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<sup>28</sup> Important Information for Attorneys from Foreign Countries Applying Under SJC Rule 3.01, s. 3 (the "Information").

<sup>29</sup> *Wei Jia v. Board of Bar Examiners*, *supra* at 2. See Footnote No. 13 of *Wei Jia*: "The board provided to the petitioner information concerning its eligibility determination of foreign applicants who had sought permission to take the bar examination in 1997 and the latter part of 1996. Of the twenty-nine applicants from foreign law schools who had graduated from a faculty that was not a 'common-law' faculty, twenty-six applicants were found by the board to be ineligible to sit for the bar examination. The remaining three applicants were informed by the board that they would be eligible to take the bar examination, subject to the completion of certain prescribed courses at an ABA-approved law school. Of the twenty-two applicants who had graduated from 'common law faculties' from countries other than Canada, thirteen applicants were found by the board to be eligible to take the bar examination on the completion of certain prescribed courses in an ABA-approved law school." (underscoring mine)

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> At Boston University, the first year curriculum is composed of the following courses: Constitutional Law, Contracts, Criminal Law, Civil Procedure, Property, Torts and a research and writing seminar.

<sup>34</sup> See, Information, 2: "Graduates of the common-law faculties of law schools in foreign countries (other than Canada) whose jurisprudence rests upon the common-law tradition, may be permitted to sit for the general bar examination upon successful completion of such academic legal study at an ABA-approved law school as the Board may require. Each applicant should confer with the Board of Bar Examiners to determine the courses to be taken. Acquisition of the Master of Laws Degree at an ABA-approved law school may be considered by the Board in determining the applicant's successful completion of the requirement of further legal studies at an ABA-approved law school. Generally, the Board will require applicants to take courses such as, for example, American Constitutional Law, Federal Courts and Jurisprudence, the Uniform Commercial Code, and the core curricular courses offered in the first year at ABA-approved law schools. In certain cases, the Board may require acquisition of the J.D. degree at an ABA-approved law school." (Emphasis supplied)

Unlike in other legal education systems around the world where most if not all of the courses leading to the conferment of the law degree is required by the school, most if not all US law schools prescribe a curriculum where the first year or 1L year consists of mandatory courses while the second and third years are made up of elective courses. Thus, beyond the courses in the 1L year, JD students at an American law school may have nothing in common with each other insofar as course work is concerned.

The classes in the 1L year can then be seen as constituting the basic core of what a JD student needs to know in order to say that he or she has a fundamental grasp of American and common law. Considering that a typical JD student does not have any knowledge of American law prior to his or her 1L year and considering that after the 1L year, that same student can claim basic knowledge of American law, can't the same observation be applied to a foreign-trained civil lawyer prior to and after doing a 1L year at an American law school?

It can be argued that taking the complete 1L year course at an American law school may cure the civil law-trained lawyer's deficiencies insofar as general knowledge of the common law and particular knowledge of American law are concerned. The 1L year courses may be taken as part of an LL.M. program or as part of an independent study course for non-degree purposes. What is important in this regard is that the student must take these 1L year classes for credit and be tested on these.

Since the SJC's decision in *Osakwe* hinged on an analysis of his educational background, then any recommendation to cure any perceived deficiencies in a foreign-trained lawyer's background should concentrate on the educational requirement. Any expansion on this educational test may prove to be an additional burden on lawyers which, in the end, are superfluous.

#### Summary

The *Wei Jia* and *Osakwe* cases provide the basic guidelines for permitting foreign trained lawyers to take the examination for admission to the Massachusetts bar. In a sense, *Osakwe* is a logical step after *Wei Jia* and gave the SJC the facts it needed in order to permit a common law-trained lawyer to sit for the examination for admission to the Massachusetts bar. The cases also suggest an approach to the treatment of candidates trained in civil code jurisdictions.

Based on these cases, we have learned that the education requirement, both the general education in common law and the particular education in American law, is the key requirement for admission to the Massachusetts bar.

For common law-trained lawyers, the criteria for admission can be summarized as follows:

1. The conferment of an LL.B. degree from a law faculty in a jurisdiction whose laws and legal education is based on the English common law tradition; and
2. The completion for credit of American law courses at an American law school which would give a student "sufficient exposure to American law."<sup>35</sup> These courses may be:

<sup>35</sup> *Osakwe v. Board of Bar Examiners, supra* at 1.

a. the courses taken by Osakwe at the University of Connecticut which were:

- i. American civil procedure,
- ii. American criminal procedure,
- iii. Immigration law,
- iv. Federal taxation,
- v. Torts and
- vi. United States law and legal institutions;<sup>36</sup> or

b. the courses prescribed by the BBE for foreign lawyers trained in the common law:

- i. American Constitutional Law,
- ii. Federal Courts and Jurisprudence,
- iii. the Uniform Commercial Code, and
- iv. the core curricular courses offered in the first year at ABA-approved law schools.<sup>37</sup>

On the other hand, for civil law-trained lawyers both the general education in common law and the particular education in American law will have to be done through course work in an American law school. Though the SJC has not ruled on this issue, the educational requirement that can be prescribed for these purposes might comprise all of the core curriculum courses offered in the first year of all ABA-approved law schools.

In closing, it must be emphasized that membership in an American bar (or any other bar) was not used as a separate criterion. Membership in an American bar was used in the *Osakwe* case merely to reinforce the fact that the petitioner had the necessary American legal education. Thus, the requirements for membership in the Massachusetts bar need not be expanded to include bar membership. Moreover, though this is more of a policy issue, insisting that a foreign lawyer be a member first of another American bar like New York or California is self-defeating. In imposing this requirement, the foreign lawyer may be attracted to practicing law in those states instead to the exclusion of Massachusetts.

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<sup>36</sup> *Ibid.*

<sup>37</sup> Information, 2.