

H-1B REQUEST HANDBOOK

*For use by Clemson University
in hiring foreign personnel who need H-1B*

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TABLE OF CONTENTS

Introduction	3
Glossary of Terms	3
List of Acronyms	5
H-1B Process	6
Forms and Templates	
H-1B Petition Information (Form 1).....	7
Actual Wage Determination Memorandum (Form 2).....	9
H-1B Prospective Employee Information (Form 3).....	11
Sample Letter in Support of H-1B Petition.....	14
Sample Credentials Evaluation Letter.....	15
Frequently Asked Questions	16

INTRODUCTION

The internationalization of Clemson University means increased numbers of foreign nationals seeking employment. The Office of International Affairs (OIA) provides support to the research and education community by coordinating and submitting H-1B petitions. This handbook gives guidance to college administrators, faculty, and staff who are involved in the hiring process.

Glossary of Terms

Adjudication: Process by which USCIS reviews and approves an H-1B petition

DS-2019: Department of State form used to establish Exchange Visitor (J-1) status

Dual Intent: Term used to describe the flexibility with regard to immigrant intent that an H-1B provides; an H-1B worker is initially employed as a non-immigrant, but later may apply for permanent residency with the sponsorship of the employer.

Employment Authorization Document: A card provided by USCIS to a foreign national – for example, a recently graduated student in F-1 status who has been granted the benefit of Optional Practical Training – to prove eligibility to work in the US.

Expedited Processing: USCIS adjudication within 15 calendar days, otherwise known as premium processing. Approval is not guaranteed.

F-1: A non-immigrant status reserved for degree-seeking students.

Hiring Official: Faculty or Staff who creates the University position, determines actual salary, interviews applicants and decides who is best qualified for the position.

H: A non-immigrant visa that allows an alien into the US temporarily to perform services or labor or to receive training; also, a status used for dependents of these workers.

H-1B: A non-immigrant status granted to the employer by the US government for the work authorization benefit of a foreign national named by that employer. Employer and employee are recognized under immigration law as having dual intent.

H-4: Category used for dependents of an H-1B employee. If the dependents are in the US, it is established via submission of an I-539.

I-20: Form required for a student F-1 visa application.

I-94: Arrival/Departure Document; a small card stapled into an alien's passport by Customs and Border Patrol officer to record legal entries into the US.

I-129: Form used by an employer to petition USCIS for H-1B status and the work authorization benefit for the foreign national employee.

I-539: Form used by non-immigrants to petition USCIS for an extension of stay or a change to another non-immigrant status.

Immigrant Petition: A petition by a foreign national to become a permanent resident of the US.

Labor Condition Application: An attestation from the employer regarding the salary and working conditions of the foreign national. Preliminary to filing H-1B petition.

Non-immigrant Petition: A petition seeking to gain permission to visit, work or reside in the US temporarily.

Optional Practical Training: A benefit that allows F-1 (student) visa holders to work for up to 12 months after completion of studies as part of their education.

Legal Permanent Resident: Foreign national who has permission to stay indefinitely in the US.

Portability: The ability to transfer the foreign employee H-1B benefit from one employer to another. Second employer must file I-129 petition.

Premium Processing: USCIS adjudication within 15 calendar days; aka expedited processing.

Prevailing Wage Determination: Made by state employment agency regarding the wage that is typical for any specific position in a geographical location. Preliminary to filing the LCA.

South Carolina Employment Security Commission: US Department of Labor local office that makes prevailing wage determinations.

Specialty Occupation: An occupation that requires a specialized body of knowledge culminating in at least a bachelor's degree.

Standard Processing: Four-month to five-month USCIS adjudication of petitions.

Work Authorization: Permission to work; it is the "benefit" granted to the H-1B worker.

List of Acronyms

DO	Designated Official within College or Department for purposes of gaining H-1B status approval
DHS	Department of Homeland Security
DOL	Department of Labor
DS	Department of State
EAD	Employment Authorization Document
IDO	Interdepartmental Order (Clemson University)
LCA	Labor Condition Application
OIA	Office of International Affairs (Clemson University)
PW	Prevailing Wage
RFE	Request For Evidence
SCESC	South Carolina Employment Security Commission
USCIS	United States Citizenship and Immigration Services

H-1B PROCESS

The H-1B process impacts University issues such as workforce recruitment, hiring procedures, and compensation. Producing the H-1B petition, submitting it, and getting it approved requires close cooperation among OIA, DO, and the foreign national, as outlined below. To be approved, an H-1B petition must prove: the petitioner is a US entity eligible to be granted H status; the position meets the definition of “specialty occupation”; the foreign national meets the minimum qualifications of the position as specified by the petitioner; and the foreign national is eligible to be granted the work authorization benefit in that position for the petitioner.

Stage I

1. After a position is established by the University and foreign candidates have been identified, the appropriate College or Departmental official (DO) notifies OIA of the open position and impending hire of a foreign national who needs H-1B work authorization.
2. DO submits Forms 1 and 2 to OIA for purposes of establishing the “actual wage”, defined as the wage normally paid to similarly employed individuals with similar experience. OIA requests a “prevailing” wage for the position from the State Employment Security Agency (SESA), the local branch of the US Department of Labor.
3. OIA discusses timing of H-1B petition with DO contact person and gets an overview of the case.
4. With information from Forms 1 and 2, OIA clears the proposed salary reflected on Form 1 through the SESA by comparing to the prevailing wage Determination to the actual wage. OIA informs DO of required wage, which is the higher of either the actual or the prevailing.

Stage II

1. DO makes written offer of employment to foreign candidate using the required wage, the higher of the prevailing wage or the actual wage. With offer, DO sends Form 3 to new foreign employee.
2. With the information provided from Form 1 and the Prevailing Wage Determination from SESA, OIA completes and files the online Form ETA-9035 Labor Condition Application (LCA) with the US Department of Labor (DOL).
3. DOL approves the LCA immediately when the SESA prevailing wage is used. The LCA certifies that Clemson hiring official has complied with all requirements in hiring an H-1B worker.
4. OIA provides two copies of a Notice of Intent to Hire a Foreign National to hiring official to post in two conspicuous locations around the area of employment for a mandated 10 working days from the date when the LCA is filed.

Stage III

1. DO provides to OIA a copy of the offer letter signed by foreign employee with completed Form 3. OIA completes and submits to USCIS the I-129 petition signed by hiring official.
2. USCIS notifies OIA of H-1B status approval or denial on Form I-797 (Notice of Action). OIA notifies DO that foreign national may begin work, if petition is approved.

FORM 1: H-1B PETITION INFORMATION

All information requested on this form is required in order to process the petition requesting H-1B status for the University and H-1B work authorization for the foreign national employee. If this information is available on other University forms (Job Evaluation Form, State of South Carolina Position Description, etc.), you may attach copies of those forms in lieu of completing every space on this form.

Information about Position

Clemson University Hiring College _____

Title of Supervisor: _____

Supervising Faculty Member: _____ Department: _____

Phone Number: _____ Fax Number: _____ E-mail: _____

Position Title to be Held by Foreign National: _____

Work Location(s) [enter complete address(es) including Zip + 4 where foreign national will perform duties]:

Proposed Salary (exact amount): _____ per _____. Full or Part Time _____

Projected Starting Date: _____ Ending Date: _____

(If extension of current employment, indicate the starting date of the requested extension period)

Describe fully the job to be performed. Please make this as detailed as possible. Do not hesitate to use technical language. (Attach job description)

Describe fully the **MINIMUM** education, training and/or experience required for the position. (Do not state the applicant's credentials.) **This is very important.**

Number of workers (excluding students) to be supervised by foreign national _____

Is this an extension of a previously approved H-1B work authorization with no changes to the job duties of the foreign national presently holding the position? Yes No

If no, attach new job description.

If this is an extension of H-1B work authorization, please provide the following information about the current H-1B employee.

Name: _____ Date of Birth: _____
(Last/Family) (First/Given) (Middle) (mm/dd/yy)

City and Country of Birth: _____ Country of Citizenship: _____

Social Security No. _____ Marital Status: _____ Number of Children: _____

Last Date of Arrival in US: _____ I-94 #: _____

Present Occupation and Summary of Prior Experience (please attach foreign national's updated resume):

Has the applicant applied for Legal Permanent Residence in the US? Yes No

Does the H-1B employee have dependents who will seek extension of H-4 dependent immigration status in the US? Yes No

If so, please complete the following:

Dependent: _____ SSN _____
(Last/Family) (First/Given) M.I.

Date of Birth _____ Country of Birth _____

Visa Status: _____ Exp Date _____

(Attach additional sheets as necessary to list the above information for all family members.)

FORM 2: ACTUAL WAGE DETERMINATION MEMORANDUM

The US Department of Labor (DOL) requires employers who are hiring H-1B employees to confirm that they will pay non-immigrants the local prevailing wage or the employer's actual wage, whichever is higher. The actual wage is the wage rate paid by the employer to all other individuals with experience and qualifications similar to those of the H-1B nonimmigrant employee for the specific employment in question. The employer is required to **establish** and **document** the actual wage rate. Factors which the hiring official can consider when determining actual wage include:

- Experience level
- Qualifications
- Education level
- Job responsibility/supervision
- Specialized knowledge/skills
- Publications
- Other objective business-related criteria

Information must be available for public examination and for DOL inspection, upon request. The public examination inspection file is kept at the CBO. The DOL file is kept in OIA.

THIS SECTION IS REQUIRED FOR ALL H-1B POSITIONS

I am attaching a full explanation to show how the department identified similarly-employed workers with similar education and experience and how the actual wage(s) was determined. I understand this information is required by the US Department of Labor. It consists of employees in the same job classification and their salaries, plus an explanation of how the salaries were set. Salaries of all employees may be adjusted annually based on performance and/or cost of living increases. I understand the salary of the H-1B worker cannot be lower than all of the other employees in the same classification because regulations require the employer to pay the prevailing wage OR the actual wage, whichever is higher.

Signature: _____ (Department Chair or Hiring Official)

To comply with the actual wage requirement, **please complete only one of the sections below** and attach required documentation, if necessary.

There are no employees in the department with the job title _____ and/or the job duties of _____ (name of foreign national). This position is unique because:

The actual wage rate is the salary which is being offered the prospective H-1B employee:

\$ _____ per _____.

Signature: _____ (Department Chair or Hiring Official)

There are _____ other employees in _____
(number) (name of department)
with the job title and duties of _____.
(job title)

The wage range for those employees is \$ _____ to \$ _____ per _____.

Within this range, an individual salary is determined by taking various factors into consideration. The factors used to determine the salary for individuals in the position in question are:

The wage offered the prospective H-1B employee is: \$ _____ per _____.

Signature: _____ (Department Chair or Hiring Official)

FORM 3: H-1B EMPLOYEE INFORMATION

(To be completed by foreign national employee only)

Name _____
(Last/Family) (First/Given) Middle

Current Mailing Address:

Telephone: _____ Email _____

Birth date (mo/day/yr) _____ City, Province and Country of Birth _____

_____ Country of Citizenship _____

Social Security # _____ Alien Reg. # (if any) _____ Male/Female _____

Valid Passport? Yes No If yes, enter expiration date _____ Passport # _____

Have you filed an immigrant petition in the US or has an immigrant petition ever been filed for you?
 Yes No

If yes, please explain: _____

Have you had H-1B status in the past 7 years? Yes No

If yes, give dates and name(s) of employer(s). Provide copies of all Approval Notices.

Have you ever been denied H-1B status previously? Yes No

If yes, please explain: _____

Are dependent family members changing to H-4 status or extending H-4 status? Yes No

If yes, how many family members? _____ (Complete Form I-539, available at www.uscis.gov, for family members)

If you are currently in the U.S., please complete this section.

Date of Last Arrival: _____ Form I-94 number _____
(mo./day/year) (eleven digits)

My current non-immigrant status in the US is _____.
(F-1, J-1, H-1B beneficiary, H-4)

The expiration date of my currently valid immigration status on my Form I-94 Departure Record is _____.
(mo/day/year)

In view of the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, please list below all US immigration statuses and dates held since your arrival in the United States.

<u>Status</u> (F-1, H-1, H-4, J-1)	<u>From</u> (Mo/day/year)	<u>To</u> (Mo/day/year)

If you have ever been in the J-1 or J-2 status, please provide dates and photocopies of all previously issued Forms DS-2019. If you are subject to the 2-year home residency, you must have already received a waiver before Clemson University can proceed with a petition for your H-1B work authorization.

Are you currently in exclusion or deportation proceedings? Yes No
If yes, please explain: _____

Do you have an application for US Legal Permanent Residence in process? Yes No
If yes, check the eligibility category under which you have applied:

- _____ Labor Certification
- _____ National Interest Waiver
- _____ Outstanding Professor/Researcher
- _____ Extraordinary Ability Alien
- _____ Family Preference
- _____ Other _____

If you are outside the U.S. or intend to apply for the H-1B visa outside the U.S., please complete this section.

Location of U.S. embassy or consulate where I will apply for my H-1B visa is: (city and country)

My home address in my country of citizenship or permanent residence is: _____

Foreign Employee Signature: _____ Date: _____

SAMPLE LETTER IN SUPPORT OF H-1B PETITION

Date

United States Citizenship and Immigration Services
Vermont Service Center
75 Lower Welden Street
St. Albans, VT 05479-0001

RE: H-1B Petition on Behalf of Dr. X

Dear Sir or Madam:

This letter is being submitted in support of Dr. X who is to be hired by Clemson University's Department of Y. Dr. X will be hired temporarily to perform services in a specialty occupation. The position titled Z requires the theoretical and practical application of specialized knowledge and requires the completion of a (Ph.D. or master's) degree or its equivalent.

The Petitioner

Clemson University is a land-grant, public university located in Clemson, SC and is supported by the State of South Carolina. The academic department Y is part of the College of YY, one of five colleges within the University. The College of YY offers BA, MS, MA and Ph.D. degrees. Faculty members, postdoctoral fellows, and graduate students in the Y Department engage in research in _____, among other areas. The Department has XX faculty members, XX postdoctoral fellows, and XX graduate students.

The Specialty Occupation

(Describe the job duties of the position to be filled by Dr. X)

The Beneficiary

Dr. X obtained his doctorate from XXX University. A copy of Dr. X's degree is included in this petition. The work which Dr. X is undertaking requires someone with at least a (bachelor's, master's or doctoral) degree. Dr. X has also had considerable experience in research laboratories following his thesis work at XXX University.

Terms of Employment

Name:

Social Security Number, If Any:

Department:

Annual Salary:

Date of Offer:

Beginning Date of Employment:

Ending Date of Employment (not more than 3 years):

Department Y agrees to pay the reasonable cost of return transportation if Dr. X is dismissed before the end of H-1B authorized employment. We further agree to fully comply with the terms of the US Department of Labor approved Labor Condition Application.

Sincerely yours,

Department Chairperson Signature

SAMPLE CREDENTIALS EVALUATION LETTER

October 17, 2006

United States Citizenship and Immigration Services
Vermont Service Center
75 Lower Welden Street
St. Albans VT 05479

RE: Credentials Evaluation of Dr. X

Dear Sir or Madam:

This is to advise you regarding the evaluation of the education and training of X, who is being offered a position as Assistant Professor in the Department of _____ at Clemson University.

Dr. X has received a Degree of Doctor of Philosophy from the Department of _____ in _____ University. Review of her academic credentials indicates an equivalency in the training and performance between the educational program Dr. X has completed and what many programs in the US would require. Thus, the Doctor of Philosophy degree she has completed is adjudged comparable to an American educational degree of Doctor of Philosophy in _____.

Sincerely,

Hiring Official's name and Title

FREQUENTLY ASKED QUESTIONS

What is an H-1B?

H-1B is a type of temporary employer and employee relationship that is defined by a petition submitted to United States Citizenship and Immigration Services (USCIS). The petition comprises documents describing the employer, the employee, and the employment; several of these documents must have prior approval from other state and federal agencies. When an H-1B petition is approved, the US Government grants H-1B *status* to the employer, which in turn gives the H-1B *benefit* (work authorization) to a foreign national employee.

H-1B is also a type of visa ensuring entry into the country. It indicates that the reason the foreign national is entering the US is to participate in a particular employer/employee relationship. An H-1B visa allows the employer and the employee to have “dual intent.” Under the doctrine of dual intent, the employer and the employee may have the simultaneous intentions of holding a temporary H-1B visa and the intention of applying for a permanent visa in the future. Thus the H-1B offers a bridge between non-immigrant status and permanent resident status.

How do I know if OIA should petition for the H-1B benefit for my prospective employee?

H-1B petitions are only appropriate for certain positions and only necessary for certain foreign national employees hired into those positions. If a foreign national has no current work authorization or has work authorization (such as that conferred by the F-1 Optional Practical Training program) that expires soon, OIA must file an H-1B petition. OIA will make a determination about the appropriateness of an H-1B petition based on information provided by the hiring unit about the job, and on information provided by the foreign national about his/her immigration status.

What kind of position qualifies?

Positions that can be filled with H-1B workers can be permanent, temporary, or temporary grant positions; they can be tenure-track or non-tenure-track faculty, unclassified personnel, or classified staff. The type of duties and the qualifications necessary to perform those duties are what enable a position to be filled with an H-1B worker. The position offered must be a "specialty occupation" requiring:

- theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation culminating in at least a bachelor's degree or its foreign equivalent (job should be advertised/authorized at the bachelor's degree level or higher) and *either*:
- a graduate degree (or in some exceptional cases, an undergraduate degree with substantial work experience) in a specific academic discipline as the standard minimum requirement for entry into the particular position, *or*
- a full state license or other certification required to perform the occupation granted after passage of normal professional tests and requirements. If the occupation requires a license, the alien must hold both at least a bachelor's degree and a license.

What kind of foreign national qualifies?

The foreign national must have:

- the minimum qualifications as stated in the State of South Carolina position description
- specialized knowledge required to perform the job tasks
- at least a bachelor's degree and a license/certification that attests to education sufficient required to perform the job tasks or a graduate degree in the field.

Are there different types of H-1B petitions?

H-1Bs are all submitted on the same USCIS Form I-129 Petition for Non-immigrant Worker, but the form allows petitioners to declare their intent, such as:

- establish H-1B status for an employer and the H-1B work authorization benefit for a foreign worker, assuming the employment is for the first time (new employment)
- transfer (port) H-1B work authorization for an employee who is changing employers
- extend an existing position's H-1B approval beyond the initial period requested (no change to job duties)
- amend a previously approved petition (make changes to job duties of employee)

Portability petitions require the last three months' pay statements or similar work verification from the previous employer to verify that the worker maintained H-1B status prior to coming to work at Clemson University.

What supporting documents are required?

Supporting documents include:

- A copy of the foreign national's diploma from a U.S. institution showing a baccalaureate or higher degree which is required by the specialty occupation, and copy of official transcript showing highest degree earned; or
- A copy of the foreign national's diploma from a foreign institution, a notarized translation of the diploma, and evidence that the degree is equivalent to a U.S. degree, or proof that the foreign national has education and experience equivalent to the required degree.
- A copy of required license (if any) or other official permission to practice the occupation in the state of intended employment.
- A copy of written contract between the employer and the foreign national.

How much does an H-1B petition cost, and who pays?

The employer can expect to pay \$820 (\$320 filing fee + \$500 fraud prevention fee) by check payable to DHS for a petition *establishing* a new employee's H-1B work benefit. The employer can expect to pay \$320 to DHS for *extending* an employee's H-1B work authorization benefit.

Add \$1000 to the expense if premium processing is required for faster government service. Either the employer or the foreign national may pay this fee, depending on who needs to expedite the H-1B petition. If it is a personal need of the employee, the employee may pay the fee to DHS. If the need to expedite is an employer need, the employer must pay the \$1000 fee to DHS.

If an application for employee's family member(s) in the US is filed with the H-1B petition, the fee paid by the foreign national to DHS is \$300 for the I-539 Application to Change or Extend Non-immigrant Status.

How long does it take to get an H-1B petition approved?

Once submitted to USCIS, adjudication can take 15 days to five months. The length of time depends on several factors, including:

- *The position itself*: some fields of national security interest come under special scrutiny, so the background checks conducted by DHS are more extensive.
- *The type of processing requested*: standard processing can take five months; premium processing expedites the process and ensures adjudication within 15 calendar days of the date the petition is logged as received. There is no guarantee of approval, however.
- *The case load of the USCIS service center*: petitions are not considered "received" until they are actually logged into the USCIS database; this initial lag can add 10 days to the total adjudication time.
- *The need for additional evidence*: sometimes USCIS requests more supporting documentation by sending the petitioner a Request for Evidence (RFE).

Once the H-1B is approved, does the foreign national need an H-1B visa before he/she can work?

This depends on the physical location of the foreign national.

- If he/she is already in the US, the beneficiary status can be granted to the employee even without an H visa in his/her passport.
- If he/she is not in the US, additional time may be needed for the H-1B visa to be issued. The approval notice from USCIS must be sent to your employee in his/her home country, so that he/she will be able to apply to the US embassy/consulate for the H-1B visa. An additional delay is possible in receiving an appointment with the embassy/consulate.

Are there any exceptions to the general rule that the foreign national can't work until the approval of the H-1B petition is received?

Both work authorization transfer (porting) and a benefit extension are exceptions to this rule:

- Work authorization *transfer* (H-1B benefit *portability*) from any other US employer requires verification from USCIS that a petition for H-1B has been filed by the second employer. The employee may work for 240 days from filing date while the “portability” petition is being processed. The “240 Day Rule” for continuation of work authorization is based on a timely-filed petition to extend status or to “port” status in an identical position with the same job description.
- Petitions to *extend* H-1B status and H-1B work authorization provide an automatic 240 days of continued work authorization while the *extension* is being processed by USCIS. This period is from the expiration date of the previous H-1B approval. An extension must be filed before the expiration date of H-1B status as listed on the I-797 Approval Notice.

How long can a department employ a foreign national with H-1B work authorization?

Generally, an alien can hold H-1B beneficiary status for six years. The alien maintains his/her H-1B benefit by continuing to perform the duties for the employer/petitioner which were described to and approved by USCIS up to the expiration date of that approved H status as reflected on the Form I-797 Approval Notice.

If a foreign national *has* held H dependent status (H-4), the department can employ him/her as an H-1B worker for six years minus the number of years already spent in H-4 status.

Is there a minimum amount of time for a foreign national to be employed with H-1B work authorization?

There is no minimum amount of time a foreign national can be the beneficiary of H status.

What happens if we want to dismiss an H-1B worker?

If the employer/employee relationship is terminated for any reason prior to the natural expiration of the employer's approved H status as reflected on the I-797 Approval Notice, other than a voluntarily termination on the part of the foreign national, the employer is responsible for the return transportation expenses to the foreign national's country of last permanent residence or country of citizenship. This is required of the employer by regulations because it is the employer who is responsible for that foreign national being in the US in the first place. The employer is not responsible for the return transportation costs of any of their employees' dependents.

I just got a new grant. Can I change the established job duties of an H-1B worker?

Not without filing an “amended” H-1B petition. H-1B work authorization for the foreign national is *employer-specific* and *position-specific*. An H-1B petition defines job tasks, the employee’s supervisor, the building where the job is carried out, etc. Therefore, the H-1B work benefit is obtained on behalf of an employee and may not be used by any other employer or for any other position with the approved employer. The worker is only permitted to work for the approved employer in the approved position at the required wage, conducting the approved job tasks.

What if an H-1B worker wants to take a second job?

An additional H-1B petition must be approved by USCIS for the second employment.

Can I employ an H-1B worker at a site outside the State of South Carolina?

This is possible, but the prevailing wage will be determined by the state in which the job tasks will be conducted.

Should we, or the foreign national, engage an attorney?

Clemson University, through OIA, reserves the right to be the sole authorizing entity for H-1B petitions submitted from Clemson University. If the foreign national wishes to employ private legal counsel, such counsel must work within Clemson University guidelines.

If the H-1B petition is not approved or approval is delayed, is the University liable?

Submission of an H-1B petition by the University on behalf of a prospective foreign national employee does not guarantee that the desired results will be produced. The approval of such petitions rests solely with US government agencies -- not with the University. Be assured that every effort will be made by OIA to produce a complete and approvable petition, and to support College hiring needs.

Is there more guidance about the “actual wage” determination?

According to NAFSA, the Association of International Educators, “The Department of Labor has made it quite clear that for actual wage purposes, it is unacceptable to set a wage based solely on the salary level set by a grant. The ‘*can’t afford it*’ argument holds little water in the face of a Department of Labor Audit. Determining the actual wage for faculty and researchers is often not as clear-cut as it is for staff employees. Human Resource offices typically have established wage or grade scales for most staff positions. Faculty and research positions, on the other hand, might not have official grade ranges. Salaries for faculty and researchers may be contingent upon many variables, including degree, publications, experience, professional recognition, etc. Faculty and research actual wage ranges can be determined by comparing the salaries offered to people with similar experience and qualifications and responsibilities. Identifying the factors that determine who gets paid more or less will be necessary in order to articulate the employer’s wage system and documenting the actual wage rate.”

“Many universities have expressed concern about the actual wage rate being determined based on several circumstances unique to the university setting. One problem is that some positions at universities are funded by grants or endowments that provide a much higher salary level for those positions than is normal for other positions of a similar nature at the university. Inclusion of those positions within the set of positions used to determine the actual wage rate would result in a dramatic upward revision of the actual wage level, potentially to a level much higher than the university is willing to pay the H-1B alien. Even though the university may believe that it is not technically responsible for the salaries of those persons paid by those grants, it would almost certainly still be considered the employer of those persons; if the process described above can not be used to eliminate such persons from the set of employees who establish the actual wage rate, the university will need to include those persons within its actual wage rate determination” (H-1B Handbook 2006 Edition by Austin T. Fragomen, Jr. and Steven C. Bell).

“The Department of Labor has stated plainly that it will not accept ‘market conditions’ or the ‘lowest negotiated salary’ that the employer is able to work out with the employee as legitimate factors to differentiate salary levels within this group of employees forming the basis for comparison for actual wage purposes. The employer must look behind the negotiated salary to the reasons why it was willing to pay a particular employee more than another, given an equal market” (H-1B Handbook 2006 Edition by Austin T. Fragomen, Jr. and Steven C. Bell).