



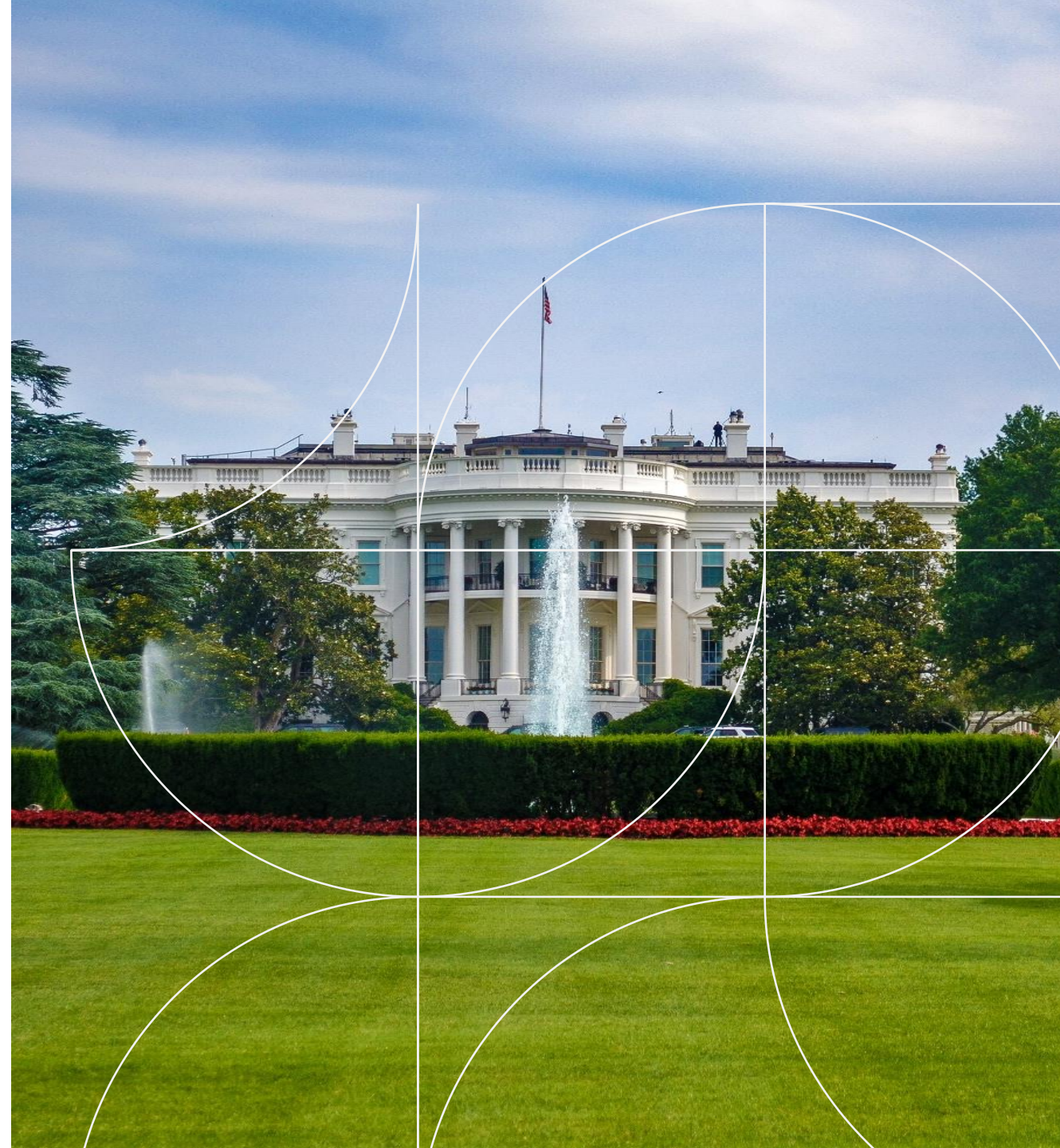
2020 US Election: How Will Immigration Change Under the Biden- Harris Administration?

Monday, December 7, 2020

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What's on the menu today:

- What new policies might the Biden-Harris Administration pursue to enhance the talent pipeline to the U.S.? What's their short and long term game plan?
- Will agencies shift to a more fair and reasonable approach to adjudications?
- Current status of proposed and interim final regulations to alter the H-1B and Green Card programs.
- What will happen to DACA and TPS (Temporary Protected Status)?
- What's the future of duration of status ("D/S") for F-1 students, J-1 exchange visitors and I media representatives?
- Questions?

First, A Little History

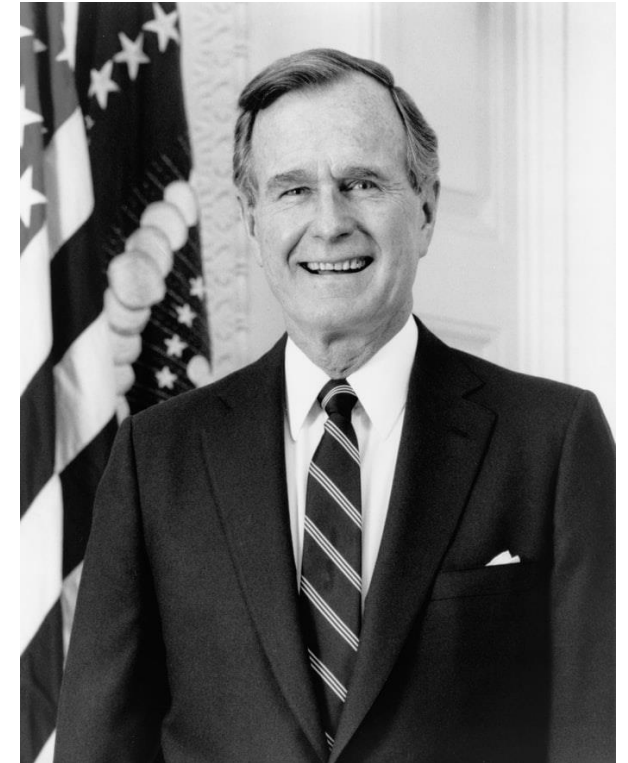
The Ronald Reagan Years: 1981 to 1989

- **1986: Immigration Reform and Control Act (“IRCA”):**
 - Introduced Form I-9 requirements and employer sanctions (for knowing hires and immigration-related discrimination).
 - Created Legalization program (some call it amnesty) for those who entered the US prior to January 1, 1992, providing a two-stage path to a green card.



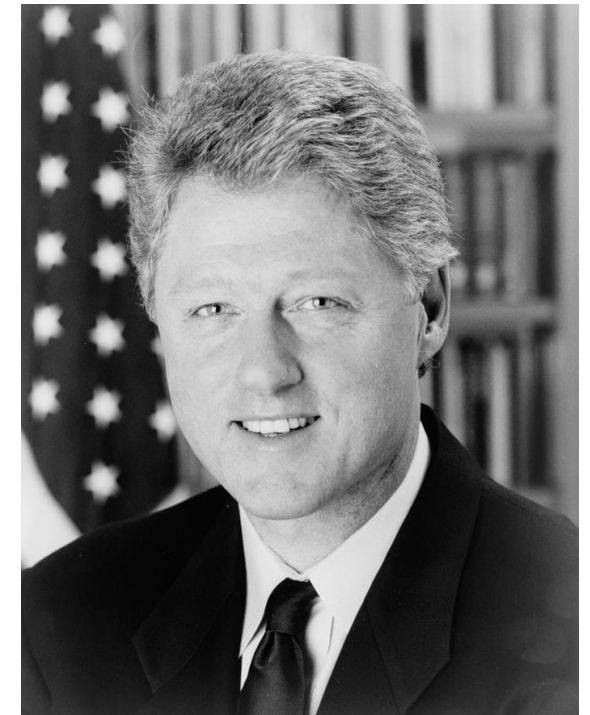
George H. W. Bush (1989 to 1993)

- **1990: “Immact 90” (Immigration Act of 1990):**
 - Created EB1 through EB5 green card categories
 - Established EB1 “Alien of Extraordinary Ability,” “Outstanding Researcher/Professor,” “Multinational Executive/Manager” and EB2 “National Interest Waiver” paths, ability to self-sponsor in two ways.
 - Created the O and P non-immigrant visa categories.
 - Introduced 65,000 “Cap” on H-1Bs and imposed DOL regulations on entire H-1B program (re: actual and prevailing wages and the LCA requirement).
 - Created the TPS (Temporary Protected Status) program.
- **1990: Executive Order 12711** (followed by **Chinese Student Protection Act** of 1992). Granted green card eligibility to Chinese students who arrived in U.S. between June 5, 1989 to April 11, 1990.



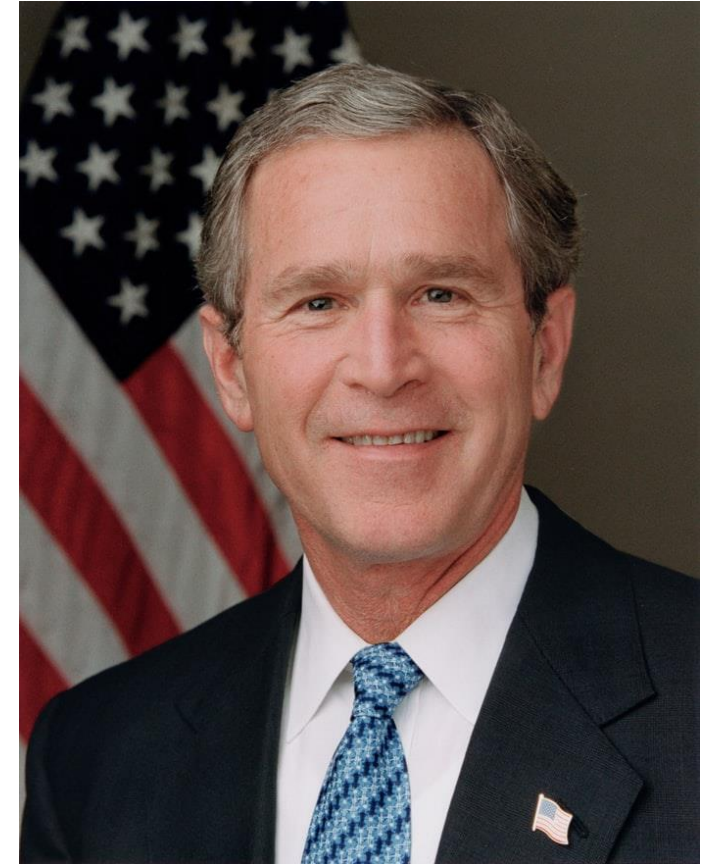
Bill Clinton (1993 to 2001)

- **1996: “IIRAIRA “ (Illegal Immigration Reform & Immigrant Responsibility Act of 1996):**
 - Introduced the 3-year and 10-year bars to reentry for individuals who accrued too much “unlawful presence.”
 - Expanded definition of “aggravated felony” and combined deportation and exclusion into a single “removal” process, resulting in “expedited removal” process.
- **1998: “ACWIA” (American Competitiveness & Workforce Improvement Act)**
 - Around time of “tech boom” at turn of the 21st C., temporarily increased H-1B cap to 115,000; also created the “no-benching” rules
 - Created ACWIA H-1B re-training fee (\$1500) and Fraud Fee (\$500)
 - Created categories of “exempt” H-1B employers and a separate wage scale
- **2000: “AC21”(American Competitiveness in the 21st Century Act)**
 - the Established H-1B portability and adjustment of status portability



George W. Bush: 2001 to 2009

- **September 10, 2001:** High-level meeting planned with President Vicente Fox and President Bush to discuss binational Immigration agreement to benefit Mexican workers in the U.S. and aid the U.S. economy.
Derailed due to events of the following day.
- **2007 to 2008:** In response to worsening economy, start of trend of increased RFEs based on attacks on L-1B “Specialized Knowledge” and H-1B “Specialty Occupation” grounds.



The Obama Years: 2009 to 2017

2008 to 2009:

- The Gang of Eight: 8 Bipartisan U.S. Senators studied immigration program, crafted a bill to “reset” aspects of the program -- including amnesty and a points system.
- Bill passed overwhelmingly in Senate, but killed by John Boehner (Speaker of the House) before Congress could take it up.

November 2014:

- Due to congressional stalemate, introduction of Executive Orders.
 - Deferred Action for Childhood Arrivals (DACA) as well as deferred action for parents of U.S. citizens and green card holders.
 - Included temporary protection and employment status



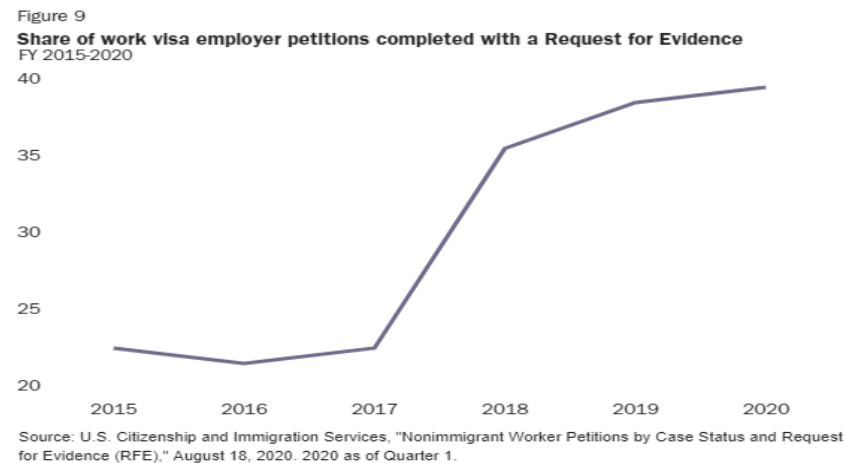
Donald J. Trump: 2017 to present

- More than 900 executive actions on immigration, but where did they begin?
 - By changing the USCIS mission statement.
- BAHA (“Buy American, Hire American”) April 2017
- Threats to DACA and TPS
- Border separations of parents and children



The Trump Years (Continued), With focus on Business Immigration Practice:

- “End of Discretion” monumental memo of October 2017
- For experienced Business Immigration clients and lawyers: the greatest number of RFEs and denials in the past 40 years were issued over the past 4 years



- Publication of a host of new instructions on forms and new rules that don't honor the APA.
- USCIS rejection of properly filed forms that didn't note “not applicable” or “none.”

So Where Are We **Now?**



- Approximately 12 million undocumented individuals with no current path forward.
- DACA and TPS recipients unsure of the future of these programs.
- Insufficient talent for agriculture, hospitality, and other industries.
- Specific sectors of U.S. economy still enjoying very low unemployment rate and shortage of skilled workers.
- “Talent Drain”: threat to U.S. leadership as key talent seeks work visas, residency in countries other than the U.S., Canada and other key countries have created a landing spot for them.
- Threat to current and potential F-1 and J-1 students and scholars wishing to pursue education, research in the U.S.

Where Are We **Now**? (Continued)

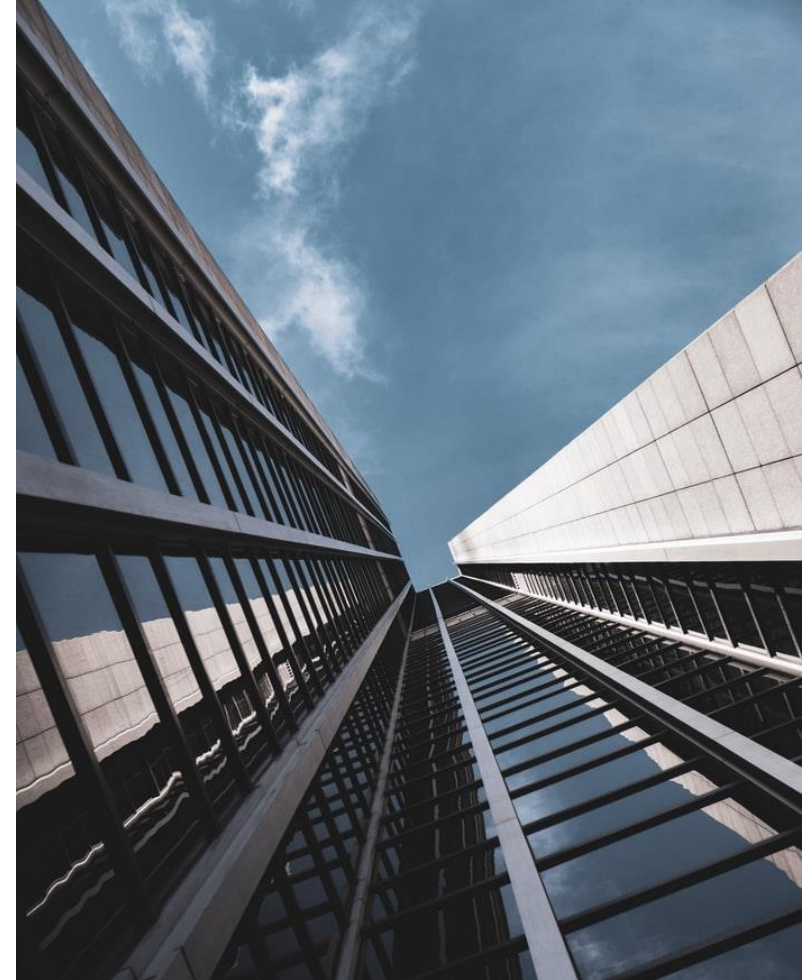
- **Executive Orders on travel:**
 - Regional COVID Ban (Schengen countries, UK, Ireland, China, Brazil, and Iran), continue until terminated by the President.
 - Labor Market Entry Ban (suspension of H-1B, L-1, and J-1 visa issuance for certain individuals), set to expire on December 31st.
- **Proposed rulemaking targeting H-1B and Green Card programs:**
 - DOL Wage Rule (IFR)– material increase in Prevailing Wages for H-1Bs, green cards.
 - Strengthening H-1B Rule (IFR) –requires almost exact match between job and degree
 - H-1B Cap Registration Rule – would scrap the current lottery framework and allocate available H-1B cap numbers based on highest wage levels.

Where Are We **Now**? (Continued)

- Mixed news for **F-1s and J-1s**:
 - Victory for OPT and STEM OPT in the *WashTech vs. DHS* case
 - Proposed rule to remove “**Duration of Status**” and establish fixed time period of admission for F, J, and I visa holders
- “**Immigration Anxiety/Fatigue**” among foreign nationals, employers, and immigration attorneys.

What's On The Horizon?

- Alejandro Mayorkas nominated for DHS Director
- Biden-Harris has established an Immigration “transition team”
- S. 386’s passage in the Senate
- *U.S. v. Facebook*, and what it could mean for immigration-related discrimination liability and the Labor Certification process.



But won't the **Biden Administration** have its hands full?

- What are the other priorities that might take precedence over Immigration?
- Who are the main stakeholders that this administration needs to consider?
- Who and what are the conflicting forces within the U.S. that might want to block opportunities for immigrants?



Ok, So What's Possible? Show Us the Low-Hanging Fruit!

- What can be accomplished through an Executive Order, Proclamation -- and what are the risks to the use (or over-use) of these approaches?
- DACA, Asylum, TPS.
- Employment-Based Executive Orders.
 - Blog: [“Big-Picture, Clean-Slate Immigration Reforms for the Biden-Harris Administration”](#)

What are the Chances for **Broad** Immigration Reform?

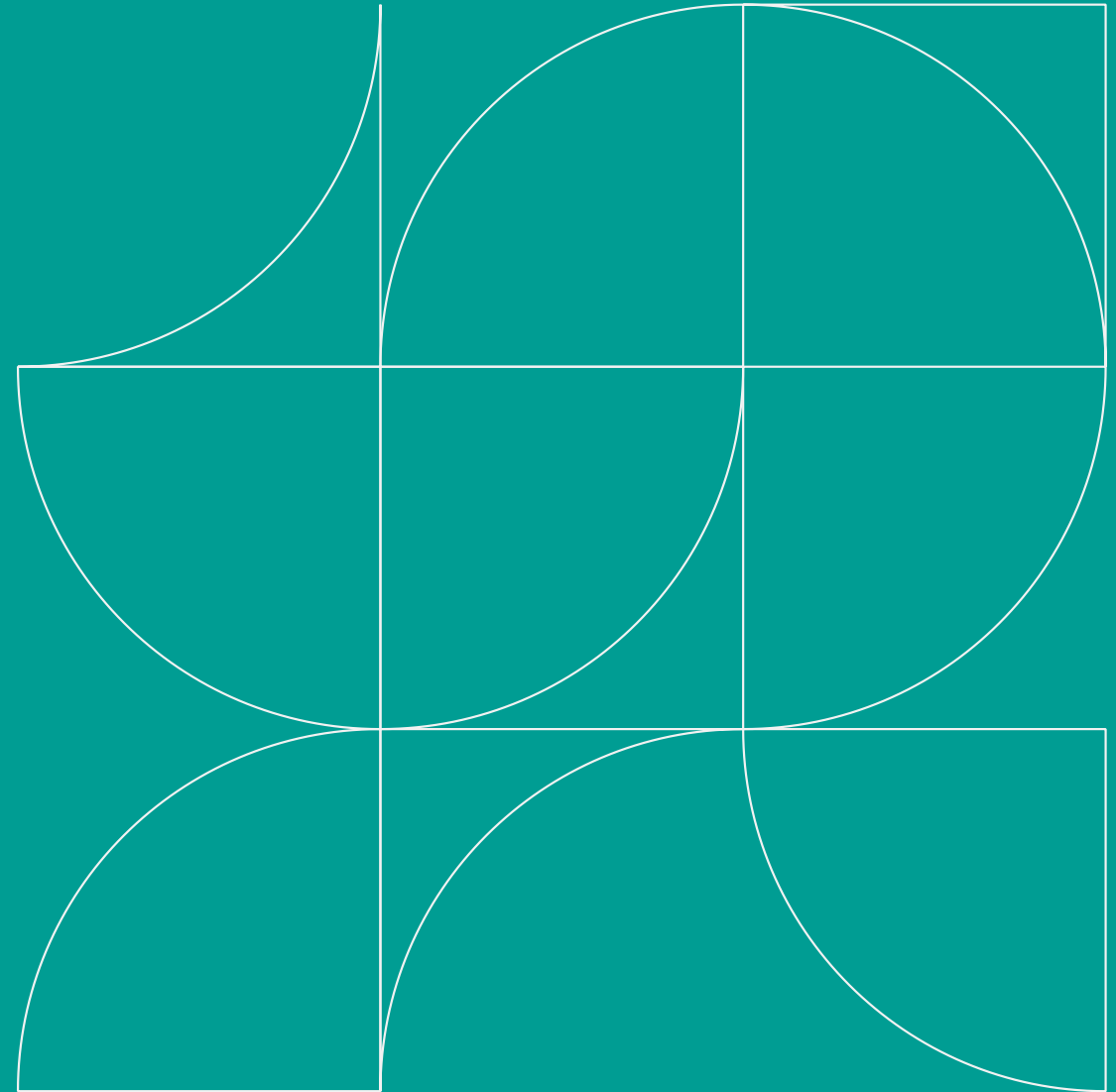
- What might it look like?
- Path to legal status or citizenship for the undocumented?
- Points System (sole, or just one, avenue to a green card)?
- Article I Independent Immigration Court?
- Greater authority of states/regions/cities to earmark start-up green cards?
- The debate re: Family versus Business Immigration
- The direction of immigration enforcement and discretion to forgive status violations/unlawful presence

Other??

- Congressional Review Act
- Ongoing litigation challenging Trump-era immigration regulations



QUESTIONS?





Additional Resources :

2020 US Election Trend

<https://www.seyfarth.com/trends/2020-us-election.html>

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