

1 **WO**

2  
3  
4  
5  
6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Rosita George,

10 Plaintiff,

11 v.

12 Office of Navajo and Hopi Indian  
13 Relocation,

14 Defendant.

No. CV-17-08200-PCT-DLR

**ORDER**

15  
16 Plaintiff Rosita George seeks judicial review of an administrative decision by  
17 Defendant Office of Navajo and Hopi Indian Relocation (“ONHIR”) denying her  
18 relocation benefits under the Navajo-Hopi Settlement Act. (Doc. 1.) The parties have filed  
19 cross motions for summary judgment. (Docs. 28, 32.) The motions are fully briefed, and  
20 oral argument will not aid the Court’s decision. *See* Fed. R. Civ. P. 78(b); LRCiv 7.2(f).  
21 For reasons stated below, Plaintiff’s motion is denied and ONHIR’s motion is granted.

22 **I. Background**

23 In 1882, a large reservation was established in Arizona for use by the Hopi Nation  
24 and “such other Indians as the Secretary of the Interior may see fit to settle thereon.”  
25 *Bedoni v. Navajo-Hopi Indian Relocation Comm’n*, 878 F.2d 1119, 1121 (9th Cir. 1989).  
26 Members of the Navajo Nation subsequently settled on the reservation alongside the Hopi.  
27 *Id.* In the decades that followed, attempts to resolve inter-tribal conflicts ultimately  
28 resulted in the Navajo-Hopi Settlement Act in 1974. *Id.* The Act authorized the district

1 court to partition the reservation and created ONHIR's predecessor to help relocate tribal  
2 members who resided on land partitioned to the other tribe. *Id.* at 1121-22. To be eligible  
3 for relocation benefits, a Navajo applicant has the burden of showing that she was (1) a  
4 legal resident of the Hopi Partitioned Lands ("HPL") on December 22, 1974, and (2) a head  
5 of household on or before July 7, 1986. 25 C.F.R. § 700.147.

6 Plaintiff was born on July 23, 1965 and was a legal resident of the HPL on December  
7 22, 1974. (A.R. 162.) After graduating high school in 1985, Plaintiff moved in with her  
8 sister Lorena Tsinnijinnie. (*Id.*) While living with Lorena, Plaintiff was not responsible for  
9 her living expenses. (*Id.* at 107.) In June 1986, Plaintiff moved to an apartment in Flagstaff  
10 that she shared with a friend. (*Id.* at 163.)

11 Plaintiff testified that from June 1985 until June 1986 she was employed by her  
12 brother-in-law, Donald Tsinnijinnie, selling Indian arts, including Kachina dolls and lamps.  
13 (*Id.* at 111, 162.) Plaintiff contends, without the support of any corroborating  
14 documentation, that she was paid \$200-300 in cash every two weeks. (*Id.*) After leaving  
15 Donald's employ, Plaintiff was hired at Burger King, but quit after one shift, earning a total  
16 of \$40.54. (*Id.* at 163.) Plaintiff then worked for Allstar Inn in Flagstaff, where she earned  
17 a total of \$568.00. (*Id.*) Next, Plaintiff worked for Coconino County, earning \$134.00  
18 before July 7, 1986. (*Id.*) All told, Plaintiff's documented earnings from January 1, 1986  
19 through July 7, 1986 were \$742.62. (*Id.*)

20 On October 21, 2009, ONHIR denied Plaintiff's application for relocation benefits,  
21 finding that she did not obtain head-of-household status during the relevant time period.  
22 (*Id.* at 51-52.) Plaintiff appealed the decision. (*Id.* at 58.) Cecelia Sands, Emilia George,  
23 and Plaintiff testified during an administrative hearing in August 2013.<sup>1</sup> (*Id.* at 99-133.)  
24 The Hearing Officer issued a decision in November 2013 affirming the denial of benefits,  
25 which became ONHIR's final decision in December 2013. (*Id.* at 161-68, 171.)

## 26 **II. Legal Standard**

27 \_\_\_\_\_  
28 <sup>1</sup> At times Sands is referred to as Cecilia Simms. Although neither party explains  
this discrepancy, neither party disputes that all references to Simms actually concern Sands.  
(*See, e.g.*, Doc. 34 at 6.)

1           **A. Credibility Findings**

2           “When the decision of [a hearing officer] rests on a negative credibility evaluation,  
3 [he] must make findings on the record and must support those findings by pointing to  
4 substantial evidence on the record.” *Ceguerra v. Sec. of Health & Human Servs.*, 933 F.2d  
5 735, 738 (9th Cir. 1991) (citation omitted). An agency’s “credibility findings are granted  
6 substantial deference by reviewing courts.” *De Valle v. INS*, 901 F.2d 787, 792 (9th Cir.  
7 1990) (citations omitted). The hearing officer alone is “in a position to observe [a  
8 witness]’s tone and demeanor, to explore inconsistencies in testimony, and to apply  
9 workable and consistent standards in the evaluation of testimonial evidence. He is . . .  
10 uniquely qualified to decide whether [a witness’s] testimony has about it the ring of truth.”  
11 *Begay v. Office of Navajo & Hopi Indian Relocation*, 305 F. Supp. 3d 1040, 1049 (D. Ariz.  
12 2018) (citing *Sarvia–Quintanilla v. U.S. INS*, 767 F.2d 1387, 1395 (9th Cir. 1985)).

13           **B. Summary Judgment**

14           A reviewing court may reverse an ONHIR decision under the Administrative  
15 Procedure Act (“APA”) if it is arbitrary, capricious, an abuse of discretion, contrary to law,  
16 or unsupported by substantial evidence. 5 U.S.C. § 706(2)(A), (E); see *Bedoni*, 878 F.2d  
17 at 1122. A decision is arbitrary and capricious if the agency:

18                       has relied on factors which Congress has not intended it to  
19                       consider, entirely failed to consider an important aspect of the  
20                       problem, offered an explanation for its decision that runs  
21                       counter to the evidence before the agency, or is so implausible  
                          that it could not be ascribed to a difference in view or the  
                          product of agency expertise.

22           *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).  
23           Substantial evidence is “more than a mere scintilla but less than a preponderance; it means  
24           such relevant evidence as a reasonable mind might accept as adequate to support a  
25           conclusion.” *Chu v. Commodity Futures Trading Comm’n*, 823 F.3d 1245, 1250 (9th Cir.  
26           2016) (internal quotation marks and citation omitted). The standard is deferential. The  
27           Court “may not substitute its judgment for that of the agency.” *River Runners for*  
28           *Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (internal quotation marks and

1 citation omitted).

2 “[S]ummary judgment is an appropriate mechanism for deciding the legal question  
3 of whether [ONHIR] could reasonably have found the facts as it did.” *Laughter v. ONHIR*,  
4 No. CV-16-08196-PCT-DLR, 2017 WL 2806841, at \*2 (D. Ariz. June 29, 2017) (internal  
5 quotation marks and citation omitted). “[T]he focal point for judicial review [under the  
6 APA] should be the administrative record already in existence, not some new record made  
7 initially in the reviewing court.” *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Summary  
8 judgment is proper if the evidence, viewed in the light most favorable to the nonmoving  
9 party, shows “that there is no genuine dispute as to any material fact and the movant is  
10 entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

### 11 **III. Discussion**

12 A Navajo applicant has the burden of proving that she was (1) a legal resident of the  
13 HPL on December 22, 1974, and (2) a head of household on or before July 7, 1986. 25  
14 C.F.R. § 700.147. Only the second element is at issue. (A.R. 142.)

15 Under ONHIR regulations, an unmarried applicant qualifies as a “head of  
16 household” if she actually maintains and supports herself. 25 C.F.R. § 700.69(a)(1), (a)(2).  
17 Although the regulations do not specify an income at which an applicant actually maintains  
18 and supports herself, ONHIR “has often held that an applicant who earns at least \$1,300  
19 per year can make a prima facie showing of self-supporting status.”<sup>2</sup> *Whitehair v. ONHIR*,  
20 No. 17-CV-8278-PCT-DGC, 2018 WL 6418665, at \*3 (D. Ariz. Dec. 6, 2018) (internal  
21 quotation and citation omitted).

22 In an effort to meet the \$1,300 threshold Plaintiff, presented evidence and testimony  
23 on her earnings in the first half of 1986. Specifically, Plaintiff offered paystubs evidencing  
24 earnings of \$742.62 during the relevant period. (A.R. 88-89.) Plaintiff also testified about  
25 her work as a sales representative for Donald. According to Plaintiff, she sold 50 Kachina  
26 Dolls and between 20-30 lamps per week, earning \$200-300 in cash every two weeks. (*Id.*

---

27 <sup>2</sup> Plaintiff contends, without supporting authority, that the ONHIR erred by not  
28 annualizing her \$742.62 in documented income earned between January 1, 1986 and July  
7, 1986. Finding no authority supporting such a reading of the statute, the Court declines  
to do so here.

1 at 105-06.) Sands, who purportedly worked with Plaintiff as a sales representative, testified  
2 to the same. (*Id.* at 116-29.)

3 The Hearing Officer credited Plaintiff’s testimony about her employment for Burger  
4 King, Allstar Inn, and Coconino County, all of which were supported by paystubs, finding  
5 that she earned \$742.62 during the relevant period. (*Id.* at 163.) The Hearing Officer,  
6 however, rejected all income Plaintiff purportedly made as a sales representative for  
7 Donald, finding Plaintiff and Sands’ testimony lacked credibility because “there are no  
8 documents or records to show that [Plaintiff] earned any money from [Donald],” nor are  
9 there “books of account or bookkeeping records in the record[.]” (*Id.* at 163-64.) The  
10 Hearing Officer further reasoned that “recollection of events more than 28 years ago  
11 without any corroboration, is unreliable.”<sup>3</sup> (*Id.* at 164.) Because Plaintiff was unable to  
12 meet the \$1,300 threshold, and because she was not living on her own and financially  
13 supporting herself, the Hearing Officer found that Plaintiff failed to demonstrate that she  
14 actually maintained and supported herself. (*Id.* at 161-68.)

15 Plaintiff argues that the Hearing Officer’s decision to deny benefits is not supported  
16 by substantial evidence because the Hearing Officer arbitrarily and erroneously rejected  
17 testimony concerning wages she earned as a sales representative. In particular, Plaintiff  
18 takes issue with the Hearing Officer’s emphasis on supporting documentation.<sup>4</sup> As  
19 support, Plaintiff cites *Tsosie v. Office of Navajo & Hopi Indian Relocation*, 771 Fed.  
20 App’x 426, 426-27 (9th Cir. 2019).<sup>5</sup> In *Tsosie*, the plaintiff provided documentary

---

21  
22 <sup>3</sup> Notably, Plaintiff’s April 2009 letter to ONHIR entitled “Work History” does not  
23 include sales representative for Donald in 1986. (A.R. 27.) Plaintiff averred that she was  
24 a self-employed sales person of Kachina dolls in 1985. (*Id.*) In response to ONHIR’s  
25 request for corroborating details about her sales of Kachina dolls, Plaintiff stated that the  
26 dolls were “designed and handcrafted by [her] sister” and that she earned “about 200 to  
27 300 [dollars] every week.” (*Id.* at 40.)

28 <sup>4</sup> Plaintiff also argues that the Hearing Officer diverged from ONHIR’s precedent,  
citing another relocation benefits case and attaching the hearing officer’s decision from  
that case as an exhibit. (Doc. 28-3.) The identical argument was raised in *Whitehair v.*  
*ONHIR*, No. 17-CV-8278-PCT-DGC, 2018 WL 6418665, at \*3 (D. Ariz. Dec. 6, 2018).  
For reasons stated therein, the Court declines to consider this exhibit.

<sup>5</sup> Plaintiff provided *Tsosie* as supplemental authority to the Court on July 23, 2019.  
(Doc. 46.)

1 evidence for \$1,200 in earnings and testimonial evidence that she earned \$60 per week  
2 babysitting her nephew during the relevant time period. The plaintiff's sister testified to  
3 the same. Finding the plaintiff and her sister's testimony not credible because it was  
4 unsupported by corroborating documentation, the hearing officer did not consider the  
5 babysitting income in determining whether the plaintiff was a head of household.

6 On appeal, the Ninth Circuit vacated the ONHIR's decision, finding that the  
7 Agency's "decision to deny benefits was not supported by substantial evidence." *Tsosie*,  
8 771 Fed. App'x at 426. Specifically, the Ninth Circuit rejected the Hearing Officer's  
9 finding that the witness testimony was not credible because it was uncorroborated by  
10 documentary evidence, reasoning that the ONHIR has previously accepted undocumented  
11 income to meet the threshold amount for head of household. *Id.* (citing *O'Daniel v.*  
12 *ONHIR*, No. 07-354-OCT-MHM, 2008 WL 4277899, at \*5 (D. Ariz. Sept. 18, 2008)).  
13 Critically, the Ninth Circuit opined that "[t]he Hearing Officer did not explain why [the  
14 plaintiff's] failure to provide written records should count against her in this instance,  
15 despite the [ONHIR's] policy of allowing such income in other instances." *Id.* at 426-27.

16 The Court finds *Tsosie* distinguishable. Babysitting, at least for family members, is  
17 not a job ordinarily accompanied by paystubs or tax returns. This type of informal job fits  
18 well within the ONHIR policy, which recognizes that "[i]n some circumstances,  
19 individuals may be able to show that they are self-supporting without the benefit of tax  
20 returns and wage statements because of the lifestyle on the HPL. It is common for  
21 individuals to make a living from livestock or support themselves through odd jobs  
22 throughout the Reservation." *O'Daniel*, 2008 WL 4277899, at \*5. Under the  
23 circumstances, however, the Court finds that Plaintiff's job as a sales representative for  
24 Daniel's art business is one that should have supporting documentation. After all, Daniel's  
25 art business had at least two employees, operated in New Mexico and Arizona, provided  
26 transportation and fuel for sales trips, produced and sold hundreds of dollars in  
27 merchandise each week, and accepted payment in cash or check. (*See, e.g.*, A.R. 104-06,  
28 109-14, 118-23.) Moreover, Plaintiff testified that "Donald usually document[ed]

1 everything on his own paperwork, so I'm sure he has that in the records somewhere.” (*Id.*  
2 at 109.) Yet, Plaintiff did not offer any records into evidence corroborating how much she  
3 made working for Donald, or that his business even existed.

4 When an applicant alleges income from a business in which it is reasonable under  
5 the circumstances to expect corroborating business records, and no such records are  
6 produced, the Hearing Officer's decision to reject such allegations is supported by  
7 substantial evidence. The Court finds *Benally v. Office of Navajo & Hopi Indian*  
8 *Relocation* and *Whitehair v. Office of Navajo & Hopi Indian Relocation* persuasive on this  
9 issue. In *Benally*, the Hearing Officer found that the plaintiff was not a self-supporting  
10 head of household after rejecting the plaintiff's claim that he earned \$100 per month selling  
11 Indian crafts. No. 13-CV-8096-PCT-PGR, 2014 WL 523016, at \*2-3 (D. Ariz. Feb. 10,  
12 2014). The district court affirmed the Hearing Officer's decision, finding it was supported  
13 by substantial evidence because the plaintiff's claim was “totally unsupported by  
14 contemporaneous documentation’ and ‘exaggerated and not credible’ based on the limited  
15 time available to [the plaintiff] to make the items . . . and the ‘limited universe of buyers,’  
16 which consisted of friends, relatives, and the occasional cowboy.” *Id.* at \*3 (citing portions  
17 of Hearing Officer's Decision).

18 In *Whitehair*, the plaintiff attempted to show that he actually maintained and  
19 supported himself through income from vending machines. 2018 WL 6418665, at \*3. The  
20 Hearing Officer found that the plaintiff was “a credible witness about his education and  
21 about placing some vending machines, but that [the plaintiff's] estimates of income from  
22 those vending machines were not credible.” *Id.* (citing portions of Hearing Officer's  
23 Decision). The Hearing Officer offered a number of reasons as support for her findings,  
24 including that the plaintiff provided no records, receipts, or signed contracts from the  
25 business, including documents regarding the machines' placement and any royalties he  
26 paid for installing his machines in various locations, and that the Hearing Officer found no  
27 proof that each of the 32 vending machines was making between 175 and 250 sales every  
28 two weeks, as would be required to achieve the income the plaintiff claimed. *Id.* at \*3.

1           The district court found that “the Hearing Officer provided several specific, cogent  
2 reasons for discrediting [the plaintiff’s] income testimony.” *Id.* The district court reasoned  
3 that “the Hearing Officer is not required to take at face value [the plaintiff’s] testimony that  
4 he earned a certain income; the [Hearing] Officer may consider lack of documentation and  
5 the unrealistic amount of claimed earnings.” *Id.* Nevertheless, because the Hearing Officer  
6 found that the plaintiff had a vending machine business, and discredited only the amount  
7 of plaintiff’s claimed income, the district court remanded for the Hearing Officer to  
8 determine “the likely income from that business” and whether such income was sufficient  
9 to support a finding of head of household. *Id.* at 5.

10           Like in *Benally* and *Whitehair*, the Hearing Officer found Plaintiff’s claims of cash  
11 earnings as a sales representative unsupported. According to the Hearing Officer, “Sands  
12 did not keep records of the quantity of merchandise she and [Plaintiff] were expected to  
13 sell, she did not track their inventory, she had no records of any individual sale, and she  
14 did not know about any formula being used to calculate payments to [Plaintiff] or her.”  
15 (A.R. 166.) Moreover, the Hearing Officer reasoned that for Plaintiff and Sands to make  
16 the amount of income alleged, “the quantity of Kachina dolls and lamps that they would  
17 have been required to sell each day was enormous . . . yet, there are no records, statements  
18 of account, bookkeeping entries, sales slips, receipts, or anything else to show how many  
19 dolls and lamps” were sold. (*Id.*) Nor was there evidence as to the selling price for any  
20 individual piece of art. (*Id.*) The Hearing Officer’s findings as to the credibility of Plaintiff  
21 and Sands concerning their work for Donald was not arbitrary and capricious or  
22 unsupported by substantial evidence. The Court therefore affirms the finding of the  
23 Hearing Officer that Plaintiff failed to meet her burden of showing that she was a head of  
24 household as of July 7, 1986.

25           To the extent that Plaintiff contends that that she actually supported herself without  
26 meeting the \$1,300 threshold, this argument also fails. The Hearing Officer’s decision was  
27 supported by substantial evidence and was neither arbitrary or capricious. For example,  
28 Plaintiff lived with her sister and was not responsible for her living expenses until June



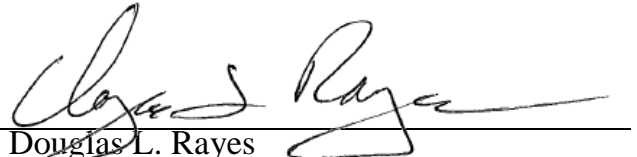
1 1986, at which point she moved into an apartment with a friend. (A.R. 162-63.) Moreover,  
2 the Hearing Officer did not find that, nor did Plaintiff offer evidence of, Plaintiff sharing  
3 rent and other expenses for the alleged apartment rented in June 1986.<sup>6</sup> (*See, e.g., id.* at  
4 150-58, 163.) Viewing these facts with the deference owed to agency decisions, the Court  
5 affirms the finding of the ONHIR that Plaintiff did not meet her burden of showing that he  
6 a head of household at the time of the move-off. Accordingly,

7 **IT IS ORDERED** that Plaintiff's motion for summary judgment (Doc. 28) is  
8 **DENIED**.

9 **IT IS FURTHER ORDERED** that ONHIR's motion for summary judgment  
10 (Doc. 32) is **GRANTED**.

11 **IT IS FURTHER ORDERED** that the Clerk of Court is directed to enter judgment  
12 consistent with this Order and terminate this case.

13 Dated this 29th day of August, 2019.

14  
15  
16  
17   
18 Douglas L. Rayes  
19 United States District Judge  
20  
21  
22  
23  
24  
25  
26

27  
28 <sup>6</sup> In fact, Plaintiff doubled down on her argument that she earned above \$1,300 in  
1985 and 1986. (A.R. at 158 (“Furthermore [Plaintiff] earned well over the required  
amount of \$1300 both in 1985 and 1986 while maintaining her legal residence.”).)